COMMENTS

ON BEHALF OF AN UNGRATEFUL NATION?: MILITARY NATURALIZATION, AGGRAVATED FELONIES AND THE GOOD MORAL CHARACTER REQUIREMENT

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I. INTRODUCTION

Following the events of September 11, 2001, Ekaterine Bautista enlisted in the U.S. Army, like many living in the United States[1] Bautista was born in Morelia, Mexico and was brought illegally to the United States as a child.[2] As an undocumented immigrant, Bautista was barred from enlisting in the U.S. military, so with her U.S. citizen aunt's permission, Bautista assumed her aunt's name, Rosalia Guerra Morelos, as well as her driver's license, birth certificate, and Social Security number.[3] Her actions were an attempt to protect her daughter, "because it was the right thing to do."[4]

Bautista went on to serve thirteen months in Baqubah, Iraq, where she received the Combat Action Badge for exposure to enemy fire.[5] The only obstacle she faced regarding naturalization was that she enlisted using her aunt's name, driver's license, birth certificate, and Social Security number.[6] Her crimes of fraudulent enlistment and altering identity documents were enough to put her application for citizenship in jeopardy, despite the magnitude of the service that she had given her adopted nation.[7] Her pending naturalization ceremony was halted when her fraudulent actions were discovered in 2010.[8]

The latter of her offenses are categorized as aggravated felonies for naturalization purposes even though they do not involve acts of violence or use of weapons.[9] Acts with this designation are statutory permanent bars to citizenship because their presence in an applicant's record prevents a finding of good moral character, one of the requirements for naturalization.[10]

Consider also the story of Private First Class (PFC) Diego Rincon, who served in the U.S. Army, and was killed on March 29, 2004 by a suicide bomber in Iraq.[11] His family brought him to the United States when he was five years old and he was less than two years out of high school when

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1. Anna Gorman, *Iraq War Veteran May be Denied Citizenship*, L.A. TIMES, Apr. 26, 2010, http://articles.latimes.com/2010/apr/26/local/la-me-immig-army-20100426.

2. *Id.*

3. *Id.*

4. *Id.*

5. Anna Gorman, *Iraq War Veteran May be Denied Citizenship*, L.A. TIMES, Apr. 26, 2010, http://articles.latimes.com/2010/apr/26/local/la-me-immig-army-20100426.

6. *Id.*

7. *Id.*

8. *Id.*

9. 8 U.S.C. § 1101(a)(43)(P) (2006).

10. *Id.* § 1101(f)(8).

11. Janice Johnston & Bill Redeker, *Immigrant U.S. Soldier Granted Posthumous Citizenship*, ABC: GOOD MORNING AMERICA, Apr. 8, 2004, at A1.

he was killed.[12] His brother, Fabian, summarized PFC Rincon's reasons for serving his adopted country by saying: "They're out there fighting for their country, their country that they love.[13] They were not born in it, but they feel so much a part of it that it's like [if] they were born here. That's how I take it and that's how my brother saw it also."[14]

Whether driven by the desire for citizenship or to give back to the nation, these patriotic "Americans-by-choice" come from every corner of the globe to serve in our armed forces.[15] Foreign-born U.S. service members killed in Iraq hailed from Nigeria, China, India, Scotland, Mexico, the Dominican Republic, and Guatemala.[16] But as the sister of one fallen soldier pointed out, "He can't take the oath [of citizenship] from the coffin . . . ."[17]

Over 31,000 non-U.S. citizens currently serve in the U.S. Armed Services.[18] One reason that the military service of immigrants is becoming more significant is that natural-born citizens are not qualified to serve. According to Pentagon statistics, over one-third of Americans aged seventeen to twenty-four are unqualified because of physical and medical issues,[19] eighteen percent are disqualified because of illegal drugs, ten percent are disqualified because of a lack of mental capacity, and five percent because of their criminal record.[20] Being of good moral character is a requirement for both the military and citizenship naturalization, but the presence of prior crimes in a legal permanent resident's background can preclude that applicant from ever gaining citizenship even though those same crimes are not serious enough to prevent enlistment in

12. *Id.*

13. *Id.*

14. *Id.*

15. Helen O'Neill, *Families Conflicted on Posthumous Citizenship*, ARMY TIMES, (Mar. 24, 2008, 10:50:14 AM), http://www.armytimes.com/news/2008/03/ap_citizenship_032408/.

16. *Id.*

17. *Id.*

18. Johnston & Redeker, *supra* note 11.

19. William H. McMichael, *Most U.S. Youths Unfit to Serve, Data Show*, ARMY TIMES, (Nov. 3, 2009, 5:08:36 PM), http://www.armytimes.com/news/2009/11/military_unfityouths_recruiting_110309w/.

20. *Id.*

the military.[21] Fighting for an adopted nation is not a recent development and has often been portrayed in literature and film.[22]

While the membership conferred upon undocumented immigrants may not be formal, there is a definite sense of social acceptance and inclusion into the community that accompanies serving in the armed forces.[23] In Greece, for example, one famous foreign fighter—and celebrated English Romantic poet—is even elevated to the level of a national hero.[24]

However, in the United States the status of these men and women is less celebrated. It may come as a surprise that Indian born U.S. Army Specialist Uday Singh, age twenty-one, was the first Sikh to die in combat in the U.S. military, and is also the first Sikh to be buried at Arlington Cemetery.[25] It may also be surprising to learn that foreign-born combat veterans, like Ekaterina Bautista, are labeled as 'aggravated felons' for crimes that do not involve violence, the use of a weapon, or even a formal conviction in a court of law.[26] This label functions as a permanent bar to

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21. *See* 8 U.S.C. § 1101(f) (2008) (listing the bars to a finding for good moral character in naturalization applicants); *see also Enlisted Soldiers: The Heart of the Army*, GO ARMY, http://www.goarmy.com/about/service-options/enlisted-soldiers-and-officers/enlisted-soldier.html (last visited Dec. 23, 2012) ("Requirements-To become an Enlisted Soldier in the U.S. Army, you must be: A U.S. citizen or permanent resident alien, 17-35 years old, healthy and in good physical condition, in good moral standing, and have a high school diploma or equivalent. Note that some Army jobs may have additional qualifications").

22. *See* LAFAYETTE ESCADRILLE (Warner Bros. Pictures 1958) (portraying young Americans flying for the French Foreign Legion in World War I); ERNEST HEMINGWAY, FOR WHOM THE BELL TOLLS (Charles Scribners' Sons 1940) (recounting the exploits of a fictional American fighting in the Spanish Civil War. This story is based on many of the men Hemingway encountered when he was in Spain covering the war as a journalist.); ERNESTO CHE GUEVARA, REMINISCENCES OF THE CUBAN REVOLUTIONARY WAR (Ocean Press 2005) (transcribing his experiences as a Cuban revolutionary. Che Guevara is arguably one of the most famous expatriate fighters and certainly one of the most romanticized.).

23. Fotis Kapetopoulos, *Lord Byron: A Man of His Time*, NEOSKOSMOS (Sept. 15, 2009), http://neoskosmos.com/news/en/Lord-Byron-man-of-his-time.

24. *Id.*

> Lord Byron is a hero to modern Greeks as the most influential westerner to support the Greek war of Independence against the Ottoman Turks in 1821. Byron put his money and body on the line for the Greek Nationalist Revolution, dying on the way to battle the Turk. Byron was a complex man with a complex life. He played an important role in the formation of the modern Greek identity and in the development of Western values in the Hellenic imagination.

Id.

25. O'Neill, *supra* note 15.

26. 8 U.S.C. § 1101(a)(43) (2006).

citizenship by precluding a finding of good moral character by an immigration judge.[27]

The good moral character requirement is one of several which apply to all applicants for citizenship. There are differing residency requirements depending on whether the applicant is a civilian, a military member, or a combat veteran, but the periods during which good moral character must be established are the same at five years.[28] All applicants are required to show attachment to the principles of the Constitution, a working knowledge of the English language, and be well disposed to the good order and happiness of the United States, and be eighteen years old or older.[29]

Not everyone is united in the view that foreign service-members should receive citizenship for serving in the military.[30] Some family members state that their deceased loved ones did not want American citizenship and that it is better for them to keep the nationality of their mother-

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27. SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES MANUAL, UNC SCHOOL OF GOV'T 43 (2008).

28. *See* 8 U.S.C. § 1439 (2006); 8 U.S.C. § 1440 (2006); 8 U.S.C. § 1427 (2006) (stating the residency requirement for civilians is five years, for military service members is three years, and no residency requirement for combat veterans).

29. Immigration Nationality Act § 312, 8 U.S.C. § 1423 (2005); *see* Immigration Nationality Act § 316, 8 U.S.C. § 1427 (2006); Immigration Nationality Act § 337a, 8 U.S.C. § 1448 (2000) (listing the statutory elements of the oath of citizenship); C.F.R. § 337.1 (covering the oath of citizenship). The oath states:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

Id.

30. O'Neill, *supra* note 15. The right to become an American is not automatic for those who die in combat. *Id.* Families must formally apply for citizenship within two years of the soldier's death, and not all choose to do so. *Id.*

> 'He's Italian—better to leave it like that,' Saveria Romeo said of her 23-year-old son, Army Staff Sgt. Vincenzo Romeo, who was born in Calabria, died in Iraq and is buried in New Jersey. A miniature Italian flag marks his grave, next to an American one. 'What good would it do?' she said. 'It won't bring back my son.' But it would allow her to apply for citizenship for herself, a benefit only recently offered to surviving parents and spouses. Until 2003, posthumous citizenship was granted only through an act of Congress and was purely symbolic. There were no benefits for next of kin. Romeo said she has no desire to apply. She couldn't bear to benefit in any way from her son's death, she said. And besides, she feels Italian, not American.

Id.

land.[31] While some foreign-born service-members may not want to repudiate their citizenship status in their homeland, the literally tens of thousands who have naturalized after service in Iraq and Afghanistan[32] prove that American citizenship is highly valuable to foreign-born service members and that this issue warrants further discourse.

The purpose of this essay is to explore the harsh consequences of the good moral character requirement and the expansion of the term "aggravated felony" as it impacts veterans. Part I examines the history of the good moral character requirement in the immigration context, the history of military naturalization, and the nexus between the two. Next, Part II considers why these people are willing to fight for our country and two circumstances under which past conduct can exclude them from citizenship. In Part III the "aggravated felony" term of art and its detriments on due process rights are discussed at length in the naturalization context. Part IV covers the Good Moral Character requirement and how it could benefit from incorporating a balancing test based on the former INA Section 212(c) balancing test. Finally, Parts V and VI examine the positive factors from the Board of Immigration Appeals Decision *Matter of Marin* and the need for a new framework to consider the positive acts of applicants.

II. MILITARY NATURALIZATION AND GOOD MORAL CHARACTER—A SHORT HISTORY

From September 2001 through the end of fiscal year 2011, the United States Citizenship and Immigration Service reported that it naturalized almost 75,000 members of the military with almost 10,000 of their naturalization ceremonies taking place outside the United States.[33] This government body is the central bureaucracy controlling who gets to become an American citizen.[34] This illustrates that military naturalization is even more prevalent today. It also illustrates the incredible amount of personal sacrifice being displayed by these proud service members in order to join our nation as full citizens.[35] The history of this path to citizenship

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31. *Id.*

32. NATURALIZATION THROUGH MILITARY SERVICE: FACT SHEET, UNITED STATES CUSTOMS AND IMMIGRATION SERVICE (2011), *available at* http://www.uscis.gov/portal/site/uscis/menuitem (follow "Citizenship for Military Personnel & Family Members" hyperlink; then "Naturalization Through Military Service: Fact Sheet" hyperlink).

33. *Id.*

34. *Id.*

35. Furthermore, the sacrifice military members make affords them the opportunity to "obtain an education, a better job, and help[ ] boost the economy every year." *See generally,* Whitney Howe, *Public or Private University? New Legislation Caps Veterans' Educational Choices That Could Cost Less*, 14 SCHOLAR 1075 (2012) (discussing the educa-

is surprisingly long in our nation as is the history of its most enigmatic requirement: demonstrating good moral character.

A. *Good Moral Character*

The rule requiring applicants for naturalization to show good moral character dates back to 1790.[36] Since that time, the application of the rule has changed dramatically as well as the length of time that an applicant must demonstrate such character. The historical reason behind the rule is simple: Congress wanted to ensure that persons seeking citizenship possessed the character to make good citizens.[37] In principle, this sounds like a great idea, but the problem lies in its application. Dubiously, this standard is plagued by subjectivity.[38] While one might expect that the standard would have been liberalized over time, like many other areas of the law, this area is marked by a steady increase in restrictions on applicants for citizenship.

Starting in the 1990's, Congress has continually classified an alarming number of non-violent criminal acts as being a statutory bar to a finding of good moral character.[39] The result is that applicants with such precluded behavior anywhere in their background are permanently barred from meeting the good moral character requirement and subsequently from ever attaining citizenship.[40] However, the full history of this requirement illustrates that jurisprudence surrounding the good moral character requirement has shifted from a non-punitive and flexible approach to one littered with permanent bars to citizenship.[41]

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tion benefits available to U.S. military veterans who participate in the various G.I. Bill programs).

36. Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1572 (2012).

37. *Id.*

38. *Id.*

39. *Id.*; *see* 8 U.S.C. § 1101(a)(43) (2006) (including as permanent bars to citizenship acts like fraud, money laundering in excess of $10,000, tax evasion in excess of $10,000, altering identity documents, theft offenses, racketeering, and some gambling related offenses, failure to appear for a felony charge, two kinds of bribery, perjury, obstruction of justice, counterfeiting); *see also* Michael Kent Herring, *A Soldier's Road to U.S. Citizenship-Is A Conviction A Speed Bump or A Stop Sign?*, ARMY LAW., June 2004, at 20, 30 (explaining that clients must be carefully advised when in doubt about the outcome of their criminal cases because a conviction may result in removal from the United States).

40. Major Michael Kent Herring, *A Soldier's Road to U.S. Citizenship-Is A Conviction A Speed Bump or A Stop Sign?*, ARMY LAW., June 2004, at 20, 30.

41. Lapp, *supra* note 36.

> For over 150 years, Congress offered no guidance whatsoever on what constituted good moral character in the naturalization context. In the absence of a statutory definition, courts developed a flexible, forward-looking standard for evaluating good moral character that did not mean to punish for past conduct but instead contem-

In addition, the inclusion in the Immigration and Naturalization Act of a catchall provision allows courts to lump together several acts to preclude a finding of good moral character when those acts, considered alone, would not support such a finding.[42] When considered in the context of military naturalization, the clear effect upon the service-member/veteran applicant is increased uncertainty whether the application will be accepted. Many factors drive these brave men and women to serve the United States, although no certainty lies in their ability to obtain citizenship. Despite the uncertainty regarding naturalization and the inevitability of being deployed to a war zone and its physical dangers since 2001, almost 75,000 service-members have realized their dream of citizenship by using this path.[43] Can we really continue to encourage this practice without giving these brave men and women a fair and workable path to becoming American citizens?

The process for making new citizens possesses a long history in our nation. The Act of March 26, 1790 required that an applicant for citizenship prove two years residency, a showing of good character and was only available to free white persons.[44] By 1795, Congress added 'moral' to the good character formulation and raised the residency requirement to five years.[45] In 1802, the requirements were amended to include a declaration of intent to apply for citizenship three years before admission could be granted.[46] The applicant was also required to denounce all foreign sovereigns and all noble titles in addition to making an oath to the U.S. Constitution.[47] The five-year residency requirement is still present today in INA Section 316(a).[48]

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plated prior transgressions and recognized the potential for reform . . . . Since 1990, Congress has added hundreds of permanent, irrebuttable statutory bars to a good moral character finding triggered by criminal conduct. Where no statutory bar applies, naturalization examiners may still deny an applicant on character grounds in their discretion. The effect of these statutory changes and agency practices is the creation of bars to citizenship not found in the statute, subverting the statutory and regulatory scheme governing naturalization.

Id.

42. 8 U.S.C. § 1101 (f)(9) (2006).

43. NATURALIZATION THROUGH MILITARY SERVICE: FACT SHEET, *supra* note 32.

44. Darlene C. Goring, *In Service to America: Naturalization of Undocumented Alien Veterans*, 31 SETON HALL L. REV. 400, 408–09 (2000).

45. *Id.*

46. *Id.* at 410.

47. *Id.*

48. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 316(a), 66 Stat. 242.

No person, except as otherwise provided in this title, shall be naturalized, unless such applicant, . . . immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence,

The first case to define good moral character came in 1878.[49] The federal court in *In re Spenser* opined, "probably the average man of the country is as high as it can be set."[50] This case involved a man who was previously convicted of perjury and then pardoned.[51] The court further reasoned that the governor's pardon had no probative value in the analysis of Spenser's good moral character.[52] The court concluded that the pardon only worked to erase an individual's guilt and kept the bad act in the good moral character analysis by noting, "the past is not obliterated."[53]

This case also reinforced the principle that a court could not consider bad acts outside the statutory residence period.[54] This allows for a person to redeem their prior bad acts, from a naturalization standpoint, by maintaining a record of good behavior for the required statutory period of residence. In his article, *Reforming the Good Moral Character Requirement*, Kevin Lapp recalls that even a convicted murderer could establish a period of good moral character according to a 1944 Immigration and Nationality Service manual for employees and this idea still lingers today.[55] His article contrasts the liberal attitude towards prior criminal acts found in the judicial system and other governmental bodies to the increasingly restrictive legislation passed by Congress.[56]

In Lapp's thinking, the greatest assault on veteran's rights came in the form of the Anti-Drug Abuse Act of 1988 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[57] These two pieces of legislation incorporated the term 'aggravated felony' into the naturaliza-

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within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time.

Id.

49. Lapp, *supra* note 36, at 1586.

50. 22 F. Cas. 921, 921 (C.C.D. Or. 1878).

51. *In re Spenser*, 22 F. Cas. at 921.

52. *Id.* at 922.

53. *Id.* at 923.

54. *Id.* at 921.

55. Lapp, *supra* note 36, at 1588. *Compare* Lawson v. U.S. Citizenship & Immigration Services, 795 F. Supp. 2d 283, 285 (S.D.N.Y. 2011) (holding that Vietnam Marine Corps veteran born in Jamaica was able to establish good moral character despite having been convicted of manslaughter for killing his wife during an argument in 1985, problems with drug and alcohol addiction, and serving thirteen years in prison—all of which happened after his military service), *with* Castiglia v. Immigration and Naturalization Services, 108 F.3d 1101, 1103 (9th Cir. 1997) (denying application for naturalization of Vietnam War veteran from Italy based on presence of 2nd degree murder conviction from twenty-three years prior—which happened after his honorable military service).

56. Lapp, *supra* note 36, at 1588.

57. *Id.* at 1590–91.

tion analysis.[58] The latter act greatly expanded the kinds of bad acts that could be included under the 'aggravated felony' misnomer.[59] In fact Lapp bemoans the horrid state of affairs for immigrants:

> That is not to say, however, that an aggravated felony for immigration purposes necessarily correlates to a conviction for a serious or violent crime. Indeed, it does not even guarantee that the person was convicted of a felony. A person with only misdemeanor convictions can be considered an aggravated felon. As just one example of many, misdemeanor theft of a videogame valued at approximately ten dollars can make someone an aggravated felon for immigration purposes. Further, the INA's broad definition of conviction captures criminal cases that result in deferred adjudications and suspended sentences via rehabilitative statutes that later erase the record of guilt . . . This makes it possible for someone without a criminal record to be considered an aggravated felon for immigration purposes.[60]

Finally, the INA contains a catchall provision codified in 8 U.S.C. Section 1101(f), which allows a finding of no good moral character, notwithstanding the fact that the applicant does not fit any of the statutory

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58. *See* Pub. L.No. 100-490, 102 Stat. 4181 (codified in scattered titles and sections of U.S.C.); *see also* Lapp, *supra* note 36, at 1590–91 (describing how Congress has expanded the definition of aggravated felony: "Two years later, however, Congress broadened the reach of 'aggravated felony' in two important ways. First, it expanded the definition of 'aggravated felony' to include any 'crime of violence' for which the person was sentenced to greater than five years and 'any illicit trafficking in any controlled substance.' Second, it added a provision that barred anyone convicted of an aggravated felony at any time after passage of the act from ever establishing good moral character. This eliminated an individual inquiry for any naturalization applicant convicted of an aggravated felony after November 29, 1990, substituting a per se conclusion regarding the applicant's moral character that survived indefinitely.")

Id. See Abbe Kingston, *Aggravated Felonies—Harsh Consequences*, KMH IMMIGRATION, http://www.kmhimmigration.com/aggravated-felonies.html (last visited Dec. 24, 2012) ("As with AEDPA, [IIRIRA] made a significant expansion of the aggravated felony definition. Section 101(a)(43) INA, 8 U.S.C. § 1101 (a)(43), which began as one paragraph in 1988, now contains 21 paragraphs with many subparagraphs. With the expansion of the definition of aggravated felony under IIRIRA, some 50 general classes of crime are currently specifically enumerated. Today, practice under IIRIRA requires a very close analysis of the criminal charges because seemingly all convictions considered felonies under federal law will qualify as aggravated felonies. Moreover, because recent statutory changes apply retroactively to offenses committed decades ago (that may even have been misdemeanors), past offenses may now be grounds for removal from the U.S. as aggravated felonies.") *Id.*

59. Lapp, *supra* note 36, at 1590–91.

60. *Id.* at 1592.

prohibitions.[61] Lapp goes on to specifically discuss how USCIS employs this provision to frustrate the naturalization for large numbers of applicants even today.[62]

In essence, the jurisprudence on good moral character has shifted completely away from the notion of rehabilitation and allowing applicants to justify their case for citizenship. Congress has replaced this idea with a regimen of permanent statutory bars for behavior not necessarily amounting to a conviction and a framework for linking other bad acts together under the catchall provision to deny citizenship.[63] The effects of this system create a discrete group of unrepresented people who are unjustly denied many abilities or motivations to take part in the political process or the community.[64] In the context of military naturalization, it is very unjust that a service member who makes the ultimate sacrifice while deployed can receive posthumous citizenship in spite of any bad acts in their past,[65] but a living service member who is fortunate enough to complete his or her service honorably could still be barred for non-violent past acts.[66]

B. *Military Naturalization*

The first significant piece of American legislation addressing the naturalization of service members was the Alien Soldiers Naturalization Act

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61. *See* 8 USC § 1101(f) (2006) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.").

62. Lapp, *supra* note 36, at 1590–91.

63. *See* 8 USC § 1101(f) (2006) ("The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.").

64. Lapp, *supra* note 36, at 1621.

> The good moral character bar to naturalization accomplishes the same as felon disenfranchisement: silencing the political voice of those who have committed crimes. Yet it suffers the same critique as felon disenfranchisement. Foreclosing access to full political rights frustrates social cohesion, and it does not sustain justification under any of the four classical justifications for punishment. A blanket bar to a good moral character finding based on a list of crimes that varies from the most serious to the petty is not proportional. Since the consequence of criminal behavior by noncitizens is increasingly deportation, a collateral bar to citizenship cannot be said (and most certainly has not been proven) to provide any additional deterrence to crime. The bar does not manage risk because the people are not physically excluded but continue to live and work in the community. It does, however, frustrate rehabilitation by labeling these individuals as incorrigible outsiders.

Id.

65. Immigration and Nationality Act, Pub. L. No. 82-414, § 329(a), 66 Stat. 25 (1952).

66. *See* 8 USC § 1101(a)(43) (2006) (defining "aggravated felony").

of 1862.[67] This Act encouraged foreigners to join the Union Army during the Civil War by streamlining the requirements for citizenship.[68] This legislation is one of the first embodiments in American legal history of the principle that service during a time of war confers membership in our community and that the requirements for citizenship should be less stringent for service members.[69] Specifically, the Act required no previous declaration of intent, only one year's residence, and an honorable discharge.[70]

Interestingly, this Act only applied to the U.S. Army.[71] One Englishman tested the Act in *In Re Bailey*[72] in 1872 when he was denied citizenship after his services in the Civil War with the U.S. Marine Corps.[73] By

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67. Goring, *supra* note 44, at 410–11.

68. *Id.* at 411.

69. *Id.* "This Act was the first in a series of statutes to offer expedited naturalization to aliens who agreed to defend the Union in its war against the Southern states."

> That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove a more than one year's residence within the United States previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.

Id.

70.That any alien, of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become a citizen of the United States, and that he shall not be required to prove a more than one year's residence within the United States previous to his application to become such citizen; and that the court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.

Id.

71. *See* Alien Soldiers Naturalization Act, Rev. Stat. of 1878 § 2166; Goring, *supra* note 44, at 411–12 ("In the case of In re Bailey, the court noted that Revised Statute § 2166 explicitly applied to alien veterans of the U.S. Army.").

72. 2 F.CAS. 360, 362 (D. Or 1872).

73. *Id.*

> The term army or armies has never been used by congress, so far as I am advised, so as to include the navy or marines, and there is nothing in the act of 1862, or the circumstances which led to its passage, to warrant the conclusion that it was used therein in any other than its long established and ordinary sense—the land force, as distinguished from the navy and marines.

Id.

1894, Congress extended naturalization privileges to include members of the Navy and Marine Corps,[74] requiring them serve at least four years by 1914.[75] However, the requirements were still more stringent than the Army, showing the more stringent attitude of Congress towards military naturalization during times of peace.[76]

The next period during which naturalization requirements were eased came during the First World War. Aliens residing in the United States who where forced into military service were rewarded in 1918 with an amendment to section Four of the Uniform Naturalization Act of 1906.[77] This amendment exempted service-members both from providing proof of five years residence as well as making a prior declaration of intent to naturalize.[78] Additionally, the expansion of the privilege to Filipinos and Puerto Ricans with three years of service, notwithstanding wartime status, reflected an upswing in the liberal attitude toward granting citizenship to foreign service-members.[79] However, even though Congress saw

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74. *See* Goring, *supra* note 44, at 412 ("Two decades after Bailey, Congress adopted the Act of July 26, 1894." This Act addressed the problem in Bailey by expanding the alien naturalization privileges established in Revised Statute § 2166. The Act applied the privilege to "any alien who has enlisted or may enlist in the United States Navy or Marine Corps."); *see also* Act of Mar. 2, 1837, ch. 21, 5 Stat. 153 ("[I]t shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by the direction of the President of the United States."); Act of Mar. 3, 1809, ch. 33, 2 Stat. 544 (authorizing an augmentation of the Marine Corps).

75. Goring, *supra* note 44, at 412.

76. *Id.* at 411.

77. *See id.* at 414 (rewarding though amending the requirements).

78. *See id.* (providing a more accessible naturalization system through a "new provision of section four [which] provided that WWI alien veterans were not required to submit a 'preliminary declaration of intention' or "proof of the required five years" residence in the United States.").

79. *Id.* at 414–15. The Acts' amendments allowed for Filipinos, Puerto Ricans and Native Americans to serve and be rewarded by the federal government:

> Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for reenlistment; or any alien, or any Porto [[sic] Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States . . . or in the United States Navy or Marine Corps, or in the United States Coast Guard . . . may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence in the United States.

Id.

> That every American Indian who served in the Military or Naval Establishments of the United States during the war against the Imperial German Government, and who has received or who shall hereafter receive an honorable discharge, if not now a citi-

fit to confer citizenship on its soldiers and service-members, it did not hesitate to punish those who failed to answer the call.[80]

The time period between the First and Second World War saw the first permanent statutory bars to citizenship for previous crimes or acts.[81] These prohibitions were carved out of the Act of 1917, which created an even greater number of permanent statutory bars to citizenship for the general pool of applicants.[82] Under these provisions of the 1926 Act, veteran status counted for nothing if the applicant was ridden with a contagious disease, a polygamist, a prostitute, a contract laborer, a previous deportee, or convicted of a crime.[83] Additionally, residency and character requirements were once again imposed on alien veterans for the first time since the Civil War.[84] Thus, the inter-war years experienced the same Congressional constriction of the requirements for citizenship experienced between the Civil War and the First World War.[85]

> zen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship . . . ."

Id. at 415 n.62.

80. *See In re* Gnadt, 269 F. 189 (E.D. Mo. 1920) (holding that the application of an alien who had enlisted into the Army and then deserted therefrom and been found guilty in a court-martial and sentenced to a dishonorable discharge and one year hard labor was denied with prejudice); Jubran v. United States, 255 F.2d 81, 84 (5th Cir. 1958) (holding that Palestinian applicant was barred from citizenship because of his election to take exemption from military service); Petition of Velasquez, 139 F. Supp. 790, 792 (S.D.N.Y. 1956); Petition of Skender, 248 F.2d 92, 95 (2d Cir. 1957) (rejecting the application for citizenship of an Iraqi national who applied for exemption from military service during World War II); *see also* In re Schrape, 217 F. 142, 145 (W.D. Wash. 1914) (denying the petition of a sailor who served in the revenue cutter service for four years but did not intend to reenlist).

81. These bars were present in the Act of 1926 and from the 1917 Congress' intent to restrict naturalization for certain veterans. *See* Goring, *supra* note 44, at 416 (explaining the process of the adoption of restrictions of naturalization for veterans).

82. *See* Goring, *supra* note 44, at 416 (alluding to the restrictions based on health and potentially being a public charge to the country).

83. *See id.* (listing the various bars of inadmissibility for veterans); *see also* Act of May 26, 1926, Pub. L. No. 294, ch. 398, 44 Stat. 654-55 (describing these veterans as "nonquota immigrants").

> '[N]onquota immigrant[s]' which meant that they were not subject to the numerical quota limitations set forth in the Immigration Act of 1924. This classification as a nonquota immigrant insured that the alien veteran, upon satisfaction of the requirements for admissibility and proof of eligibility for an immigrant visa, would not be required to wait before an immigration visa was issued.

Goring, *supra* note 44, at 416 n.69.

84. *See* Goring, *supra* note 44, at 417 (explaining that "the Act of May 25, 1932 reinstated the residency and morality requirements that had not been imposed on alien veterans since 1862.").

85. *Id.*

However, the need for manpower during the Second World War quickly increased the value of military service again, and by 1942, Congress substantially relaxed the requirements.[86] Under the amendments passed in that year, a military applicant was not required to show residency, age, English language proficiency, or literacy, and most notably, the racial restrictions present since the Civil War were inapplicable.[87] Oddly, these applicants were still required to submit affidavits of two U.S. citizens confirming their good moral character.[88] By 1952, Congress repealed the earlier Act of 1940 and replaced it with another Act, greatly increasing the number of veterans eligible for naturalization through the

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86. Congress amended the 1940 Act to adjust for the need of military personnel to make the process of naturalization more accessible for soldiers. *See* Goring, *supra* note 44, at 419–20 (recognizing the need to award military personnel for their service). Congress also enacted the first G.I Bill in 1944 in order to make education more accessible for veterans returning from World War II. Whitney Howe, Comment, *Public or Private University? New Legislation Caps Veterans' Educational Choices That Could Cost Less*, 14 SCHOLAR 1075, 1083 (2012).

87. Petition of Delgado, 57 F. Supp. 460, 462 (N.D. Cal. 1944).

> It was clearly the intent of Congress in adopting Sec. 701 to follow the historic course of granting the boon of citizenship to loyal aliens engaging to help defend this country. The House Committee reporting H.R. 1710 (which became Sec. 701) said: 'It is a matter of historic record that the Government of the United States, as an encouragement to loyal aliens engaged in the defense of this country through service in the armed forces, has in past years, relieved them from some of the burdensome requirements of the general naturalization laws' House Misc. Rep. 10661, page 3. And again in the same report, it is stated: 'This proposed legislation proceeds upon the principle that non-citizens who are ready and willing to sacrifice their lives in the maintenance of this democratic government are deserving of the high gift of United States citizenship when vouched for by responsible witnesses as loyal and of good character and shown by government records as serving honorably'

Id.; see also Goring, *supra* note 44, at 420 (stating "In fact, Congress needed so desperately to increase the number of enlisted personnel in the Armed Forces that in 1942 it added Title III, sections 701 through 705, to the Nationality Act of 1940. By doing so, it provided a statutory framework to almost immediately naturalize aliens serving in WWII. Section 701 of Title III of the 1940 Act, as amended, provided that any alien enlistee who honorably served in the military or naval forces during WWII was eligible for naturalization regardless of age, satisfaction of residency requirements, English language proficiency, or literacy requirements. An alien veteran of WWII was, however, required to be 'lawfully admitted to the United States, including its Territories and possessions' at the time of enlistment or induction, and was required to submit affidavits from two credible United States citizens that he was known as 'a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.' Racial restrictions to naturalization found in Section 303 of the 1940 Act did not apply to those aliens who qualified under Section 701.")

88. *See* Goring, *supra* note 44, at 421 (explaining the requirements that Congress demanded of veterans who wished to naturalize).

military.[89] The 1952 Act dropped all racial prohibitions to naturalization and also retroactively applied to veterans of the First World War.[90]

Most importantly, the 1952 Act contained the two statutory methods to gain citizenship through military service that are still available today: Sections 328 and 329 of the Immigration Nationality Act, codified as 8 U.S.C. Section 1439 and Section 1440 respectively.[91] The former allows for naturalization through peacetime service and the latter allows for naturalization during times of war.[92] This article discusses a method to reduce the restrictions for combat veterans seeking naturalization under Section 329.[93] This statute represents the idea that actual wartime service is the most valuable type of military service and should have the fewest requirements for naturalization.[94] Section 328 represents the notion that peacetime service also confers some benefit to the applicant/service-member over the civilian applicant.[95]

Section 1440 allows the president to designate periods of hostilities to which its benefits will extend.[96] This provision has been utilized variously over the past fifty years, but most recently in Executive Order No. 13269 of July 3, 2002, during President George W. Bush's administration.[97] This act designated the period of hostilities after September 11, 2001 as applicable under Section 1440 to the naturalization of foreign service-members.[98] This period of hostilities is still ongoing, more than eleven years later. Due to more recent changes, service-members are no longer required to pay the application fee—often in excess of $370—which is an meaningful advantage compared to the general pool of applicants.[99] Regardless, this fee waiver greatly benefits disadvantaged and minority groups in America because these groups comprise the majority of aliens in the U.S. Armed Forces.[100]

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89. *Id.* at 423–24.

90. *Id.* at 425.

91. Immigration and Nationality Act, Pub. L. No. 414, § 328, 66 Stat. 249 (1952) (codified as amended at 8 U.S.C. § 1439) (1952); Immigration and Nationality Act, Pub. L. No. 414, §328, 66 Stat. 250 (1952) (codified as amended at 8 U.S.C. § 1439 (2004)).

92. *Id.*

93. *Id.* §329, 66 Stat. 250-251.

94. *Id.*

95. *Id.*

96. 8 U.S.C. § 1440 (2012).

97. Exec. Order No. 13268, 67 Fed. Reg. 45,287, 45, 287 (Jul. 3, 2002).

98. *Id.*

99. Herring, *supra* note 40, at 22.

100. NATURALIZATION THROUGH MILITARY SERVICE: FACT SHEET, *supra* note 32.

C. *The Nexus Between Military Naturalization and Good Moral Character*

The history of the good moral character requirement and military naturalization are forever intertwined. From the Revolutionary War to the deserts of Iraq, foreigners have pledged their loyalty to the United States and fought in her wars, of which many were true existential crises for the nation.[101] These individuals demonstrate some of the greatest traits of Americans such as courage, determination, and loyalty. They have both the will to overcome adversity and to stand up against oppression. They enlist into our military fully aware of the fact that their actions may have existential consequences in a far more literal and personal sense.

Having been at war for over a decade now, we must re-evaluate, as a nation, the value that we place on military service in designated combat zones. From its inception, our nation has traditionally attributed significant social value to such inimitable service.[102] The significance of this service must be weighed against all types of prior bad acts to determine, for the good moral character analysis, which acts are excusable and which ones must still present a permanent bar to citizenship. Previously, the Immigration and Nationality Act embraced such a balancing test in former Section 212(c), and this test should be reconsidered in the naturalization context. This article does not suggest that any habitual criminal who happens to be a veteran should be given citizenship as a matter of course, but the expansion of the 'aggravated felony' term to many un-convicted, drug-related, non violent, or misdemeanor acts clearly over-reaches the original intent of the good moral character requirement and the great history of its application.

III. WHAT MAKES FOREIGNERS FIGHT FOR OUR COUNTRY

Section 337.1 of Title 8 of the Code of Federal Regulations mandates that every naturalizing citizen must take an oath upon completion of the requirements for citizenship in order to finally become a citizen.[103] This

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101. MARGARET D. STOCK, ESSENTIAL TO THE FIGHT: IMMIGRANTS IN THE MILITARY EIGHT YEARS AFTER 9/11, 3 (2009), *available at* http://immigrationpolicy.org/sites/default/files/docs/Immigrants_in_the_Military_-_Stock_110909_0.pdf.

102. Goring, *supra* note 44.

103. 8 C.F.R. § 337.1 (2012). The oath states:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I

oath is significant for many reasons; the first significant aspect mandates that the oath-maker repudiate the authority of their nation of origin.[104] The potential citizen must also make several substantial promises pertaining their allegiance to our nation in times of war and the potential for both military and civil service in such times.[105] Notably absent are any pledges to act with "good moral character." But strangely, when it comes to military and civil service in times of emergency, the oath of citizenship includes three more provisions than the oath of enlistment for the United States military.

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.[106]

The preceding oath of enlistment for the United States military contains the basic promises of a service member's respective commitments to the Constitution, the Nation, and the chain of command. It also subjects oath-maker to the Uniform Code of Military Justice. From the perspective of a natural-born citizen, the individual provisions of this oath appears intuitive. However, when read from the perspective of a non-citizen, the oath of enlistment raises many of the same concerns as the oath of citizenship. Like the oath of citizenship, it is both a repudiation of one's own homeland in many respects and a vow to an adopted nation, which may not necessarily reciprocate the feelings of inclusion.

Thus, a major concern facing foreigners today when joining our military is uncertainty—not only about war and combat, but also uncertainty as to how much their adopted nation values their service. While the inherent risk to life is inescapable during wartime, many of the procedural uncertainties facing these service members today are a more recent creation. As it stands at the time of this writing, these men and women may be risking their life and freedom citizenship that may never be granted. While the reality of combat is undeniably harsh, perhaps even harsher are those laws allowing a denial of citizenship based on crimes that did not end in conviction.

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will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

Id.

104. 8 C.F.R. § 337.1 (2012).

105. *Id.*

106. 10 U.S.C. § 502(a) (2006).

These brave men and women volunteer for service that many Americans are either unwilling or unable to do because of physical or mental inability, or because of legal disqualification.[107] Our country benefits greatly not only from the unique cultural and language skills[108] that these people bring into our military but also from their undeniable patriotism. Undoubtedly, their actions demonstrate that these people are distinctly American no matter where they originate, because they understand and value the price of freedom as well as, and maybe even better than, some natural-born citizens. The dignity of their sacrifice demands that a better-articulated and more uniform procedure be established so that these men and women can properly evaluate what they are giving up and what they stand to gain by joining our armed forces.

Allowing foreigners to risk their lives by joining our military should continue to be an honored path to full citizenship and not used merely as a recruiting tool to take advantage of individuals to fill the ranks. The procedures for naturalizing our service-members should be made more just by allowing for a greater application of leniency for past non-violent criminal convictions. Additionally, any acts not resulting in conviction should be disregarded for service members who have served in a time of war and apply for citizenship under Section 329 of INA. In essence, the presence of honorable wartime military service in an application for naturalization should outweigh some types of bad conduct that would normally preclude a finding of good moral character.

Before examining the problem directly, a few facts will help illustrate who these people are that risk their lives for our freedom. The history of foreigners serving in our military is not only long but also involves a diverse group of people. The Revolutionary War was brought to an end with the help of Frenchmen fighting along side the colonists and blockading General Cornwallis at Yorktown.[109] Out of 1.5 million Union soldiers in the Civil War, 20 percent of them were foreign-born.[110] That number

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107. MISSION: READINESS—MILITARY LEADERS FOR KIDS, READY, WILLING, AND UNABLE TO SERVE 1 (2009), *available at* http://cdn.missionreadiness.org/MR-Ready-Willing-Unable.pdf.

108. *See* Julia Preston, *Pentagon Reopens Program Allowing Immigrants with Special Skills to Enlist*, N.Y. TIMES, Oct. 27, 2012, http://www.nytimes.com/2012/10/28/us/pentagon-reopens-program-allowing-immigrants-with-special-skills-to-enlist.html (noting that "Officials are also looking for native speakers of 44 languages, including Azerbaijani, Cambodian-Khmer, Hausa and Igbo (both spoken in West Africa), Persian Dari (spoken in Afghanistan), Portuguese, and Tamil (spoken in South Asia). Spanish is not on the list of languages.").

109. JOHN E. FERLING, ALMOST A MIRACLE: THE AMERICAN VICTORY IN THE WAR OF INDEPENDENCE 531 (2007).

110. Jeanne Batalova, *Immigrants in the US Armed Forces*, MIGRATION INFORMATION (May 2008), http://www.migrationinformation.org/feature/display.cfm?ID=683.

was actually a substantial drop from the 1840's when around half of the military recruits were immigrants.[111] Throughout World War I, World War II, and the Vietnam War, legal permanent residents were subjected to the draft up until the last draft call went out in December 1972.[112]

One could view this status—involving a limited right to remain in this country and work, but with no voting rights or eligibility for other services—as a sort of intermediate ground, half-way between being an illegal foreigner and a full citizen. Interestingly, even in 2008, long after the U.S. government eliminated the draft and in a time when the law permitted legal residents to remain in this country indefinitely, over 65,000 foreign-born service members served in the U.S. military.[113] This number represented about 4.8 percent of 1.36 million active duty service members.[114] The figures are also significant because they show that substantial numbers of foreign-born service members are still willing to serve in a time of war. These figures are also significant because they show that a substantial number of foreign-born service members have committed to serving our country during a time of war. Also worth noting, out of these 65,000 military members, approximately 11,000 are foreign-born women.[115] With these facts in mind, it is easy to understand how military naturalization has become a significant, if not also an unsung, pathway to becoming an American citizen.

Further, one could conclude that this pathway to citizenship provides our country with a unique source of quality citizens. On this point and according to the American Immigration Council, Polish immigrant General John Shalikashvili is the "most prominent contemporary example."[116] General Shalikashvili immigrated from Poland shortly after World War II and went on to serve as Chairman of the Joint Chiefs of Staff, one of the highest ranking positions in our nation's military[117]

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111. *Id.*

112. *See* John T. Correll, *When the Draft Calls Ended*, 91 AIR FORCE MAGAZINE, April 2008, at 68, 73, *available at* http://www.airforce-magazine.com/MagazineArchive/Pages/2008/Aprilpercent202008/0408draft.aspx (identifying the last person to be inducted into the U.S. military as the result of the draft as Dwight Elliott Stone, a "[twenty-four]-year old apprentice plumber from Sacramento, Calif.").

113. Batalova, *supra* note 110.

114. *Id.*

115. *Id.*

116. MARGARET D. STOCK, IMMIGRATION POLICY CTR. OF THE AMERICAN IMMIGRATION COUNCIL, ESSENTIAL TO THE FIGHT: IMMIGRANTS IN THE MILITARY EIGHT YEARS AFTER 9/11, 4 (2009), *available at* http://www.immigrationpolicy.org/special-reports/essential-fight-immigrants-military-eight-years-after-911.

117. *Id.*

The largest number of foreign nationals serving in the U.S. military come from the Philippines and Mexico.[118] They numbered roughly 15,000 and 6,000 respectively, in 2008.[119] Since 2004, policy changes have allowed these service members to participate in naturalization ceremonies abroad, for example, at U.S. military bases located in ally nations and conflict zones.[120] Also, one should note that this group of service members includes personnel born in various west-Asian countries, including, for instance, Iraq (ninety-seven service members), Pakistan (sixty-nine service members), Afghanistan (twenty-seven service members), Syria (thirteen service members), and even Iran (thirty-two service members).[121] Additionally, since 9/11, the government has posthumously awarded citizenship to over one hundred service members, killed in the line of duty.[122] This is an important benefit because it allows the immediate family members of the deceased—surviving widows and children—to obtain U.S. citizenship.[123] Of all the military branches, the Navy has the most foreign-born service members.[124] Approximately 8 percent of all individuals serving in the Navy are foreign-born.[125] While this group of service members not only hails from diverse nations, a great bulk of can also be classified into particular minority groups. This is especially true for Hispanics who, when compared to the total force, are slightly underrepresented in the military as compared to the general population[126] de-

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118. Batalova, *supra* note 110.

119. *Id.* In 2008, 22.8 percent (14,854) of the foreign-born U.S. military service members were from the Philippines while 9.5 percent (6,188) were from Mexico. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *See* Jeffrey P. Sexton, *Noncitizen Servicemembers: Do They Really Have to Die to Become U.S. Citizens?*, ARMY LAW., Sep. 2008, at 50, 50 (recognizing that not only does posthumous citizenship bestow an "inimitable honor" upon the fallen service member but that it, also, generates "special immigration and naturalization opportunities for the deceased's direct family members, such as the eligibility for permanent resident and citizenship processing."); *see also* O'Neill, *supra* note 15 (identifying non-naturalized service members as "Green cared soldiers" and commenting on how, of the 37,000 soldiers currently naturalized, 109 have been granted citizenship posthumously).

124. *Id.*

125. *Id.*

126. *See* Ann Marlow, *The Truth About Who Fights for Us*, WALL ST. J., Sept. 27, 2011, http://online.wsj.com/article/SB10001424053111903791504576587244025371456.html?mod=rss_opinion_main (stating that while considering how Hispanics are underrepresented in the military, "the explanation . . . is probably . . . a matter of difficulty speaking English. Only 12 percent of Army enlisted personnel are Hispanic, as opposed to 21 percent in the 18-39 year old population with a high school degree.").

spite the fact that Hispanics comprise the greatest number of service members seeking naturalization.[127]

In order to understand the problems facing these brave Americans, one must first consider what it is that these individuals hope to gain from their military service. As shown, their goal is often American citizenship. While the differences between a citizen and a legal permanent resident may appear nominal to some, these distinctions can mean a great deal for those individuals without the full benefits of membership in our society. As a practical matter, however, there are important similarities. Both legal permanent residents and citizens are required to pay taxes.[128] Both have a right to remain in the United States (although the quality of that right is certainly different),[129] and both have similar guarantees of due process under the Constitution.[130]

Regardless of these similarities, the differences, nevertheless, reveal a lesser status for the legal permanent resident. The most obvious difference being the right of a citizen to vote. It has been said that "one of the most important privileges of democracy in the United States of America is the right to participate in choosing elected officials through voting in elections."[131] This is a right, which a legal permanent resident can never reasonably expect to gain because this right is one of the defining factors between the two status types.[132] While voting rights are the hallmark of full membership in our national community, are they also the reason that people risk their lives by joining our military? Are these rights desirable enough to justify such an immediate risk, as opposed to waiting the statutorily proscribed five-year period?

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127. *See* Herring, *supra* note 40, at 20, 32 (showing that of the total number of immigrants in the U.S. military, as of April 2003, naturalized citizens and non-citizens from the Philippines and Mexico comprise 25.2 percent and 10.2 percent, respectively).

128. *Tax Topic 851—Resident and Nonresident Aliens*, IRS, http://www.irs.gov/taxtopics/tc851.html (last reviewed or updated Sept. 14, 2012).

129. *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, USCIS, http://www.uscis.gov/portal/site/uscis/menuitem (follow "Green Card" hyperlink; then "Rights and Responsibilities of a Green Card Holder" hyperlink) (last updated Aug. 16, 2010).

130. *See, e.g.*, Ferreras v. Ashcroft, 160 F. Supp. 2d 617, 625 (S.D.N.Y. 2001) (providing an example of due process analysis in the context of a legal permanent resident alien and stating that "legal permanent resident aliens, who have been admitted to the United States, enjoy rights under the Constitution, including the right to due process of law in connection with deprivation of life, liberty or property.") (quoting *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001)).

131. *The Right to Vote*, USCIS (June 6, 2010), http://www.uscis.gov/portal/site/uscis/menuitem (follow "Green Card" hyperlink; then "The Right to Vote" hyperlink) (last updated June 6, 2010).

132. *Id.*

In light of these considerations, one should also consider other relevant and meaningful differences between the two status types. Legal permanent residents are not allowed to hold a public office or hold government jobs[133]—with the notable exception of the military, but non-citizens cannot join the officer corps of any branch of the military.[134] However, the most practical difference for a potential enlistee may be the ease with which citizens may bring their families to the United States as opposed to legal permanent residents.[135] The Pentagon has recently succeeded in shortening this process from years to months for military recruits who enlist in specialized fields, namely medical and linguistic areas.[136]

Also there are at least two other sources of motivation for joining the armed forces worth mentioning: opportunity and pride. While there is a general sense of opportunity simply in coming to the United States and gaining legal permanent resident status, the type of opportunity the military provides is more concrete. Instead of the mere promise or hope of a gainful employment, the military itself is a substantive job that is almost always hiring.[137] Also, the military does not historically eliminate its employees through mass layoffs or merely employ seasonal labor.[138] One can see that, for humble foreigners who might lack the training, education, or experience necessary to compete in the private sector of the U.S. economy, the U.S. military effectually provides almost instant access to

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133. *See* STANLEY A. RENSHON, CENTER FOR IMMIGRATION STUDIES, ALLOWING NON-CITIZENS TO VOTE IN THE U.S.? WHY NOT 21 (2008), *available at* http://www.cis.org/NoncitizenVoting (discussing a particular case in New York in which non-citizens were denied the right to stand for a specific civil-service examination and more broadly quoting "[t]his Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause.").

134. *See* MOLLY F. MCINTOSH ET AL., CAN'S INSTITUTE FOR PUBLIC RESEARCH, NON-CITIZENS IN THE ENLISTED U.S. MILITARY 5 (2011) (identifying one area of difference involving officer accessions into the U.S. Army Reserve whereby non-citizens holding green cards can serve as commissioned officers in either the medical branch, the legal branch, or the chaplain corps).

135. *See Green Card for a Family Member of a Permanent Resident*, USCIS, http://www.uscis.gov/portal/site/uscis/menuitem (follow "Green Card" hyperlink; then "Green Card for a Family Member of a Permanent Resident" hyperlink) (last visited Dec. 24, 2012) (highlighting the differences between permanent resident relatives and relatives of U.S. citizens).

136. *See* Preston, *supra* note 108 (stating that immigrants can obtain expedited citizenship by the time they complete basic training, which can be as few as ten weeks).

137. *See, e.g.*, *Military Recruitment 2010*, NATIONAL PRIORITIES (June 30, 2012), http://nationalpriorities.org/analysis/2011/military-recruitment-2010 (stating that the Army, for instance, met its recruiting goal of 74,500 active duty recruits for fiscal year 2010, a time when other sectors of the U.S. economy were not expanding their employee labor force).

138. Kate Pomeroy, *Will Budget Cuts Lead to Army Layoffs?*, CONCERNED VETERANS FOR AMERICA (Apr. 26, 2012), http://concernedveteransforamerica.org/2012/04/26/will-budget-cuts-lead-to-army-layoffs.

the American dream: a secure job with great benefits along with a pathway to citizenship. While service members may lack a certain amount of discretion in choosing where to live, they can rest assured that for whichever duty station the government assigns them, there will be included a welcoming and diverse community of military personnel and their families, along with schools, housing, and a sponsorship program to help with the integration of newly arrived personnel into the surrounding community.[139] This is true whether the base is in Texas, South Korea, Germany. or Alaska.[140] One should consider the expanse of these military support programs when considering what, if any, support organizations are available to civilian applicants for U.S. citizenship.

There is one significant drawback to military service, however, and that is the real possibility of having to engage in armed conflict. On this point, one can see however, that the other motivational factor, discussed above, comes into play. While voting rights may define full citizenship, it seems intuitive that an overwhelming sense of pride in America forms the desire and motivation of many foreign-born individuals when they make the decision to enter military service. No doubt, the pride these individuals hold for their adopted homeland motivates them to do things that many native-born citizens can not or will not do. In addition, one should consider that, while this country took a chance in welcoming these individuals into our society, these individuals, as well, took a chance on our American society by risking their lives through military service. As a society we should recognize that there is a sacred element involved in these unspoken agreements—an aspect to the agreement that effectively makes such individuals into American citizens instantaneously, in substance if not in law. Regardless of politics, when our nation enters into an armed conflict, the individuals who answer our nation's call to service are meeting the very same set of obligations that empires, nation-sates, kingdoms, and tribes have demanded of their citizens throughout history. What sacrifice could possibly be more appropriate to confer citizenship, if not the sacrifice made by those who defend our nation in battle? And more importantly, what does it say about America if our practice is to rely on the

139. *See, e.g.*, *MWR History*, ARMY MWR, http://www.armymwr.com/commander/history.aspx (last visited Dec. 24, 2012) (providing a developmental history of support organizations within the U.S. Army). Specifically, the U.S. Army has created organizations such as the U.S. Army Community and Family Support Center in order to address such diverse issues as "child care, youth programs, schools, libraries, sports and athletics, financial counseling, spouse employment programs . . . lodging, and fitness centers." *Id.*

140. *See, e.g.*, *My Installation*, ARMY MWR, http://www.armymwr.com/installation/default.aspx (last visited Dec. 24, 2012) (providing links to MWR support organizations located at Army installations across the world).

sons and daughters of other nations in our own conflicts and then deny those same individuals membership into our society?

As a matter of practical concern, it is difficult, one might say, to determine exactly when an immigrant service-member transforms into an American. It may be when that person swears their allegiance to our nation's Constitution, or when that individual arrives at basic training. It may be when that individual's boots touch down in a foreign combat zone. At one of these times, we stop referring to these individuals as "foreigners," and start calling them "American Soldier," "American Sailor," "American Airman," or "American Marine." Once these individuals put on our military uniform, they represent our nation and the best that we have to offer. Can we really say that such individuals who wear the American flag, *our* flag, on their shoulder, and who deploy to places like Iraq and Afghanistan, are not true Americans? Can we really say this about individuals who deal with daily bouts of small arms fire, improvised explosive devices, suicide bombers, and mortar attacks? Can we deny them citizenship even though we may not be brave enough or able enough to go and fight for our own country ourselves? Can we really deny these individuals the title of "American citizen" because of past conduct that did not even result in a conviction? Clearly the service such individuals render our nation is of great value. The long history of relaxed naturalization requirements for those who choose to serve provides substantial evidence of our nation's recognition of this fact.

By looking closely of the categories of behavior preventing these service members from naturalizing can illustrate the absurdity of the current state of the law. As of the writing of this Comment, the types of conduct that can prevent a finding of good moral character are numerous and diverse. As mentioned earlier, many of them fall under the 'aggravated felony' term of art even though they are neither felonies nor criminal convictions. This examination focuses on several types of behavior that are important in the naturalization context: violent crimes, crimes of 'moral turpitude,' and the blanket term "aggravated felony." The importance of relying on the applicant's behavior comes from Congress as interpreted by the Supreme Court. In *United States v. Macintosh*[141] the

141. 283 U.S. 605 (1931). The Court stated:

> In specifically requiring that the applicant . . . has behaved a man of good moral character, attached to the principles of the Constitution of the United States, etc., it is obvious that Congress regarded the fact of good character and the fact of attachment to the principles of the Constitution as matters of the first importance. The applicant's behavior is significant to the extent that it tends to establish or negative these facts.

United States v. Macintosh, 283 U.S. 605, 616 (1931).

court described the importance of behavior as a factor in the good moral character analysis.[142]

In deference to this logic, the alternative analysis suggested by this essay focuses on the behavior of the immigrant who serves the United States during wartime. Just as prior bad conduct can tend to disprove good moral character, this behavior tends to demonstrate its existence. As a general matter of timeliness, if the past conduct occurred before the honorable military service, then it would be more reasonable to assume that it could outweigh some prior transgressions. Also, it is difficult to imagine any act showing more attachment to the principles of the Constitution than swearing a public oath to support and defend that document. Federal district courts are recognized to have discretion to determine good moral character in fact,[143] and their analysis should not ignore this extraordinary act. Generally, the courts enjoy some agreement concerning the principles underlying the good moral character analysis, but the *application* of the character inquiry by the courts has proven to be problematic.[144]

The first type of behavior to be examined is violent crimes. This term may include crimes like murder, rape, assault, battery, robbery, family violence, and any crime committed with a weapon.[145] Unfortunately, for alien veterans, these types of crimes automatically prohibit a finding of good moral character,[146] and they should continue to prohibit such a finding if they occurred in the statutory period. Crimes as serious as these pose a threat to society. This is because crimes of violence are an extreme repudiation of the basic rules of our society to allow for rehabilitation if they fall within the statutory period. Our public policy cannot encompass a special rule for veterans allowing them to naturalize in spite of such highly reprehensible acts.

While veterans are generally portrayed as a proud and honorable group, it is important to recognize that they are also capable of committing serious crimes just like anyone else.[147] Sadly, this can be especially

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142. *Id.*

143. V. Woerner, Annotation, *What Constitutes Showing of "Good Moral Character" on the Part of an Applicant for Naturalization*, 22 A.L.R.2d 244 (1952).

144. *Id.*

145. 8 U.S.C. § 16 (2006).

146. *See generally* Woerner, *supra* note 143 (discussing cases in which veteran aliens were barred naturalization due to these various crimes).

147. *See* Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008, http://www.nytimes.com/2008/01/13/us/13vets.html?pagewanted=all&_r=0 (discussing murders and domestic violence committed by veterans of Iraq and Afghanistan).

true for those who have endured the terror of close combat .[148] It is now known that many of those who deploy to combat zones may suffer from the effects of post-traumatic stress disorder (PTSD).[149] With respect to alien veterans, their subsequent legal problems could be linked to this condition as a direct result of their combat service and could ultimately have disastrous effects on their application for citizenship.[150] Specifically, this may occur when the applicant's bad acts take place after his or her period of honorable military service and within the statutory period requiring good moral character. Particularly affected by this paradox are those who served honorably and separated from the military, and then applied for citizenship at a later date, like many Vietnam veterans.[151] The kinds of violent crimes that have prevented veterans from being naturalized include: sexual assault,[152] aiding and abetting murder,[153] and sec-

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148. *See* R. Jeffrey Smith, *Sharp Rise in Violent Crimes Cited Among Returning Iraq Veterans in Colo. Unit*, WASH. POST, July 28, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/27/AR2009072702331.html (stating that one Army unit committed an exceptionally high number of crimes after returning from a tour in Iraq and linking the occurrences with combat conditions and obstacles in requesting proper care).

149. *See* William H. McMichael, *VA Diagnosing Higher Rates of PTSD*, ARMY TIMES, Jan. 16, 2009), http://www.armytimes.com/news/2009/01/military_veterans_carestats_011609w/ (asserting that the VA and outside organizations calculate the PTSD rate for Iraq and Afghanistan veterans to be approximately 22–23 percent).

150. *Id.*

> In addition, the 23 percent of veterans seen by VA who were initially diagnosed with PTSD, Zeiss agreed, is generally in line with outside estimates. In an April study by the Rand Corp., nearly 20 percent of Iraq and Afghanistan veterans surveyed reported symptoms of PTSD or major depression. Many of those who have served in the wars, Rand noted, have been exposed to prolonged periods of combat-related stress or traumatic events. Rand also found that many service members say they don't seek treatment for psychological illnesses because they fear the repercussions will harm their careers.

Id.

151. C. Peter Erlinder, *Post-Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to Effective Representation*, BEHAV. SCI. & LAW, 1983, at 25, 25–26, *available at* http://works.bepress.com/peter_erlinder/20

> Although estimates of the number of Vietnam combat veterans who suffer from Post-Traumatic Stress Disorder vary from as few as 500,000 to as many as 1,500,000 it is becoming increasingly clear that a substantial number of those who served in Vietnam continue to feel the psychological effects of that experience. The behavior associated with PTSD not only presents diagnostic and treatment issues for mental health professionals, but may have legal implications as well.

Id.

152. *See* Taylor v. U.S. Att'y. Gen., 801 F. Supp. 2d 1103, 1106 (W.D. Wash. 2011) (denying application for naturalization because of Canadian conviction for sexual assault of a minor).

153. *See* Toolasprashad v. Schult, No.10-CV-1050 (LEK/DRH), 2011 WL 3157297, at *5 (N.D.N.Y. Apr. 7, 2011), *report and recommendation adopted*, No. 9:10-CV-1050 (LEK/

ond-degree murder.[154] The government's interest in deterring such crimes will always enable Congress and administrative agencies to pass stringent legislation and rules to prevent persons guilty of such acts from obtaining citizenship. However, some courts support the notion that there should be a place within our jurisprudence for rehabilitation, which allows applicants to make up for past mistakes.[155]

Two major purposes form the foundation for keeping violent crimes as statutory bars to citizenship. The first reason is that the commission of any felony would result in the revocation of any citizen's right to vote,[156] and the right to bear arms. As such, there is no reason to allow special waiver of these punitive measures for any discrete group, including veterans. Those who commit these acts have long been excluded from the political process, because these acts include such a far deviation from the basic norms of society.[157]

Second, allowing a finding of good moral character, notwithstanding these crimes, would create precedent that allows foreign military personnel a free pass for violent crimes that pose a grave threat to society.

DRH), 2011 WL 3157290, at *4 (N.D.N.Y. July 26, 2011) (denying application for naturalization and writ of habeas corpus because of guilty plea to aiding and abetting a murder).

154. *See* Castiglia v. I.N.S., No. C-94-20634-JW, 1995 WL 470217, at *1–2 (N.D. Cal. Aug. 2, 1995), *aff'd*, 108 F.3d 1101, 1104 (9th Cir. 1997) (affirming that a murder conviction will bar a veteran's application for naturalization).

155. *See* Lawson v. U.S. Citizenship & Immigration Services, 795 F. Supp. 2d 283, 296–97 (S.D.N.Y. 2011) (holding that a Vietnam Marine Corps veteran born in Jamaica was able to establish good moral character despite having been convicted of manslaughter for killing his wife during an argument in 1985, problems with drug and alcohol addiction, and serving thirteen years in prison—all of which happened after his military service).

156. *See* Sharon Browne & Roger Clegg, *Felons Have Lost Their Right to Vote*, LOS ANGELES TIMES, June 13, 2010, http://articles.latimes.com/2010/jun/13/opinion/la-oe-browne-felonvote-20100613 (asserting that "[e]very state in the country except two—Maine and Vermont— prohibits at least some felons from voting.").

157. *Id.*

> In January, a panel of the U.S. 9th Circuit Court of Appeals held that the state of Washington is violating the federal Voting Rights Act by disenfranchising felons. . . . Every other federal court of appeals so far has ruled against using the Voting Rights Act to give felons the right to vote. What's more, the Constitution explicitly assumes that felons may be barred from voting. The 14th Amendment—which, like the 15th, was passed during Reconstruction to ensure equal treatment of African Americans—acknowledges that states can disenfranchise people for 'participation in rebellion, or other crime.' So an interpretation of the Voting Rights Act to bar felon disenfranchisement would not only be inconsistent with the intent of that statute, it would exceed Congress' constitutional authority. . . . There are certain minimum and objective standards of trustworthiness, loyalty, and responsibility, and those who have committed serious crimes against their fellow citizens don't meet those standards. If you aren't willing to follow the law, you can't demand a role in making the law.

Id.

However, the serious nature of these acts should continue to be inexcusable in the naturalization analysis. Those who have committed them may be allowed to become legal permanent residents, but they should not be allowed to enjoy the full rights of citizenship until the statutory period of good moral character is satisfied.

Next to be are crimes of moral turpitude. This term may include differing crimes in different jurisdictions but typically it has included things like, fraud, forgery, embezzlement, arson, larceny, robbery, theft, bribery, counterfeiting, mail fraud, tax evasion and perjury.[158] Sometimes it can also include abandonment, adultery, bigamy, lewdness, prostitution, and mayhem.[159] Aiding and abetting as well as conspiracy can also be included under this umbrella term.[160] For immigration purposes, the definition of 'crimes of moral turpitude' can be found in the Department of State's Foreign Affairs Handbook, and this source also references the list of serious crimes in Section 101(h) of INA.[161] These types of convictions have precluded service members from gaining citizenship.[162] While there is no doubt that these are serious crimes, perjury in particular is problematic when used as a bar to service members. While the purpose behind excluding those who lie in court is obvious, the practice of doing so is unjust as applied to veterans. If these people are indeed so untrustworthy, then it makes little sense to let them take the oath of enlistment in the first place. Equally nonsensical is the argument that aliens' past dishonesties can keep them from becoming a citizen, when those aliens have more recently sworn an oath to uphold the Constitution relied upon by the government. In other words, why are the citizenship standards so much higher than the standards to join the military and represent our nation in conflicts around the world? It is unjust to allow legal perma-

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158. *See generally* Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. Fed. 480 (1975) (listing the various acts that constitute crimes of moral turpitude in different jurisdictions).

159. *Id.*

160. *Id.*

161. 9 FAM. 40.21(A) CRIMES INVOLVING MORAL TURPITUDE, U.S. DEP'T OF STATE FOREIGN AFFAIRS 6 (201), *available at* http://www.state.gov/m/a/dir/regs/fam/09fam/index.htm (last visited Dec. 14, 2010).

162. *See* Toolasprashad v. Schult, No.10-CV-1050 (LEK/DRH), 2011 WL 3157297, at *5 (N.D.N.Y. Apr. 7, 2011), *report and recommendation adopted*, No. 9:10-CV-1050 (LEK/DRH), 2011 WL 3157290, at *4 (N.D.N.Y. July 26, 2011) (denying an application for naturalization and writ of habeas corpus because of guilty plea to aiding and abetting a murder); Mobin v. Taylor, 598 F. Supp. 2d 777, 785 (E.D. Va. 2009) (denying an application for naturalization based on a state conviction for making false statements under penalty of perjury); Ralich v. United States, 185 F.2d 784, 788 (8th Cir. 1950) (denying a petition for citizenship based on prior perjury conviction).

nent residents to risk their lives during times of war, yet create hurdles to establish good moral character and suitability for citizenship.

IV. THE 'AGGRAVATED FELONY'

The intrusion of criminal law into the traditionally civil arena of immigration has increased during the last twenty-five years so much that now applicants are judged by criminal norms in a civil setting.[163] This is a problem because immigration law and policy have traditionally been considered civil in nature rather than penal measures.[164] Some authors have questioned the wisdom of this intrusion and suggest that trying to develop a per se list of deportable behaviors is "fundamentally misguided."[165] The aggravated felony provision has been expanded to include those crimes, which by definition, would not be felonious or aggravated.[166] Black's Law Dictionary defines the word "aggravated" in the context of crime as made worse by violence, presence of a weapon, or intent to commit another crime.[167] While the scope of the common definition is quite narrow, the term "aggravated" as used today in the immigration context includes crimes that do not share any characteristics with the definition. Because of this, some have even gone so far as to describe the current use of this term "a tool for discrimination"[168] and a violation of international

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163. *See* Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law As Reflected in the Expansion of the "Aggravated Felony" Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 289 (2009) (mentioning the trend towards increased criminalization within the last twenty years); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 469 (2007) (explaining the modern developments of immigration law with respect to increasing incorporation of criminal law norms).

164. Harvey Silvergate, *The Arizona Immigration Law is Beside the Point*, FORBES (May 3, 2012, 9:31 AM), http://www.forbes.com/sites/harveysilverglate/2012/05/03/the-arizona-immigration-law-is-beside-the-point/.

165. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938 (2000).

166. Podgorny, *supra* note 163, at 289; *see also* Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act As a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 293 (2003); *see* Adriane Meneses, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation As Punishment*, 14 SCHOLAR 767, 778 (2012) ("Over time, the criminal grounds for which an alien can be denied entry to the United States, as well as the grounds for which an alien in the United States can be removed, have expanded enormously.").

167. Black's Law Dictionary 28 (3d ed. 1996).

168. Podgorny, *supra* note 163, at 290. *See* Linda Greenhouse, *Justices Ponder Conditions for Automatic Deportation*, N.Y. TIMES, Oct. 4, 2006, http://query.nytimes.com/gst/fullpage.html?res=9A03E6D61430F937A35753C1A9609C8B63 ("The intersection of federal criminal law and immigration law is a perilous place for the millions of legal residents

human rights.[169] When it was introduced in 1988's Anti Drug Abuse Act, the term only included murder, and drug and weapon trafficking.[170] Then in 1996, further legislation limited the relief that aliens could seek from the government, and applied the aggravated felony term retroactively to acts before it was passed and expanded the definition to almost any criminal act.[171] One way in which it does so is by categorizing as an aggravated felony any finding of guilt in a formal hearing or any guilty or *nolo contendere* plea as long as it is accompanied by a penalty or punishment.[172] This applies to the entire list of crimes prohibited by 8 U.S.C. Section 1101. Consequently, the aggravated felony analysis statutorily excludes more people than ever before. The argument for this practice appears logical when considered from an aggregate perspective because the government does have a substantial interest in ensuring that alien criminals aren't allowed to become citizens,[173] but it brings up important due process considerations as well.

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of the United States who are not citizens: one slip, one criminal conviction, can mean deportation.").

169. Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act As A Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293, 295 (2003).

170. Natalie Liem, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071, 1076 (2007).

171. Podgorny, *supra* note 163, at 294; *see* Chris Hedges, *Condemned Again for Old Crimes; Deportation Law Descends Sternly, and Often by Surprise*, N.Y. TIMES, Aug. 30, 2000, http://www.nytimes.com/2000/08/30/nyregion/condemned-again-for-old-crimes-deportation-law-descends-sternly-often-surprise.html?pagewanted=all&src=pm (noting that members of families are being detained for minor crimes committed years ago).

172. 8 U.S.C. § 1101(a)(48) (2006); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended 8 U.S.C. § 1101(a)(48) (2006); *see* Linda Greenhouse, *Across the Border, Over the Line*, OPINIOATOR N.Y. TIMES (April 8, 2010, 9:45 PM), http://opinionator.blogs.nytimes.com/2010/04/08/across-the-border-over-the-line/ (discussing that admitting guilt to minor crimes can lead to deportation and lawyers have a duty to warn their non-citizen clients of that fact).

173. Alan Gomez and Kevin Johnson, *Most Illegal Immigrants Deported Last Year Were Criminals*, USA TODAY, http://usatoday30.usatoday.com/news/washington/story/2011-10-18/deportations-criminals-homeland-security/50807532/1 (last updated Oct. 18, 2011, 12:49 PM).

> Deportations have been on the rise for the past decade, and the 396,906 illegal immigrants deported in fiscal year 2011 is the highest number yet, according to the figures. Under the Obama administration, Homeland Security issued new priorities to focus deportations on convicted criminals, people who pose threats to national security and repeated border-crossers. Last year, [fifty-five percent] of those deported were convicted criminals, the highest percentage in nearly a decade . . . Of the convicted criminals deported last year, 1,119 were convicted of homicide, 5,848 of sexual of-

For example, in 1993, the Supreme Court held in *Reno v. Flores*,[174] that aliens are guaranteed the protections of due process under the Fifth Amendment.[175] But what this means in a practical sense is unclear, because the courts can exclude many familiar constitutional protections in the civil context of a removal proceeding. One author summarized the distinctions succinctly:

> Few constitutional challenges present themselves because the Court has always construed deportation as a civil proceeding. Thus, criminal proceeding protections do not apply. The Sixth Amendment does not guarantee the right to government-appointed counsel in a civil proceeding, and Fourth Amendment exclusionary rules of evidence do not apply. The courts have also rejected challenges based on cruel and unusual punishment and double jeopardy by concluding that deportation is not punitive. Accordingly, the Ex Post Facto Clause, which bars retroactive application of punitive legislation, does not apply either. Furthermore, only limited due process protections apply. Because of this, the courts offer limited recourse, save for textual-interpretation challenges.[176]

Several areas of the 'aggravated felony' definition are difficult for all applicants, but they are especially unjust when applied to veterans seeking citizenship.[177] This is because the current jurisprudence in good moral character analysis largely ignores the applicant's record of service, despite the fact that military service is a behavior-based measure of character as favored by the Supreme Court in *Macintosh*.[178] Some of the

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fenses, 44,653 of drug-related offenses and 35,927 of driving under the influence, according to the Homeland Security figures.

Id.

174. 507 U.S. 292, 306 (1993).

175. *Id.*; *see* Van Eeton v. Beebe, 49 F. Supp. 2d 1186, 1190 (D. Or. 1999) (holding that an immigration detention statute was not narrowly tailored enough to serve the government's compelling interest of preventing alien felons from absconding and thus violated the substantive due process 5th Amendment rights of Vietnam War combat veteran and legal permanent resident from the Netherlands); *see also* Lara-Torres v. Ashcroft, 383 F.3d 968, 972 (9th Cir. 2004); Hernandez v. Mukasey, 524 F.3d 1014, 1019 (9th Cir. 2008) (holding that immigrants' reliance on the deficient advice of a non-attorney immigration consultant could not support claim for deprivation of their Fifth Amendment due process right to competent representation).

176. Liem, *supra* note 170, at 1080.

177. *See* Petition of Suey Chin, 173 F. Supp. 510, 511 (S.D.N.Y. 1959) (holding that a WW II veteran was not of good moral character because he was an admitted narcotics user and denying his petition for naturalization); *see also* McLeary v. U.S. Citizenship and Immigration Services, 11-CV-6075 MAT, 2012 WL 967970 (W.D.N.Y. Mar 21, 2012) (denying an application for naturalization from an Air Force veteran and legal permanent resident since 1963 from Jamaica, whose of arrests for burglary occurred over 40 years later).

178. *Macintosh*, 283 U.S. 605.

crimes included as aggravated felonies are not aggravated in the common sense because they do not involve any kind of violent act or a weapon. Fraud,[179] money laundering (exceeding $10,000),[180] tax evasion (exceeding $10,000),[181] altering identity documents,[182] theft offenses,[183] racketeering,[184] and some gambling related offenses[185] are all examples of crimes where the guilty party has committed no violence, and used no weapon, but is nevertheless held to the standard of a murderer or a rapist in the immigration context. The list also includes failure to appear for a felony charge,[186] two kinds of bribery,[187] perjury,[188] obstruction of justice,[189] counterfeiting,[190] forgery,[191] and any attempt or conspiracy[192] to commit any of the acts labeled as an 'aggravated felony.'

The principle mechanism by which recent legislation has expanded the reach of this term is overbroad language.[193] The trouble with the over-

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179. 8 U.S.C. § 1101(a)(43)(M)(i) (2006).

180. *Id.* § 1101(a)(43)(D) (2006).

181. *Id.* § 1101 (2006); *see* Kelly Phillips Erb, *Supreme Court Finds Tax Crimes Are Grounds for Deportation*, FORBES (Feb. 22, 2012), http://www.forbes.com/sites/kellyphillipserb/2012/02/22/supreme-court-finds-tax-crimes-are-grounds-for-deportation/ (explaining the Supreme Court affirmed the Ninth Circuit's order removing resident aliens for their convictions of tax related crimes). Three Justices dissented, arguing that the ruling was vague because it included a wide-variety of tax offenses in its definition of aggravated felonies. *Id.*

182. *See* 8 U.S.C. § 1101 (2006) (describing the charge as "falsely making, forging, counterfeiting, mutilating, or altering a passport.").

183. *See id.* (including a burglary offense which results in imprisonment for one year).

184. *Id.*; *see* Spacek v. Holder, 688 F.3d 536, 536 (8th Cir. 2012) (holding that a resident alien convicted for racketeering constitutes an aggravated felony).

185. *See* § 1101 (defining gambling as including, but not limited to, bookmaking, roulette wheels, pool-selling, maintaining slot machines or dice tables, bolita or numbers games, and conducting lotteries).

186. *Id.*

187. *Id.*; *see* Nyakatura v. Attorney Gen. USA, No. 06–3204, 256 Fed.Appx 461, 461 (3d Cir. 2007) (holding that a conviction of bribery constituted an aggravated felony).

188. § 1101; *see* Mobin v. Taylor 598 F.Supp.2d 777,777 (E.D. Va. 2009) (declaring state perjury conviction amounted to aggravated felony).

189. § 1101; *see* Denis v. Attorney Gen. USA 633 F.3d 201, 202 (3d Cir. 2011) (opining that an alien's conviction for tampering with evidence bore close to obstruction of justice and thus amounted to an aggravated felony).

190. § 1101; *see* Kamagate v. Ashcroft, 385 F.3d 144, 144 (2d Cir. 2004) (holding that possession or utterance of counterfeit securities constitutes an aggravated felony).

191. § 1101; *see* Drakes v. Zimski, 240 F.3d 246, 246 (3d Cir. 2001) (noting that a forgery conviction and a one year jail sentence amounted to an aggravated felony).

192. § 1101; *see* Conteh v. Gonzales, 461 F.3d 45, 45 (1st Cir. 2006) (alien's conviction of conspiracy met the qualifications for aggravated felony).

193. *See* Anthony Lewis, *Abroad at Home; Serving Family Values*, N.Y. TIMES, Apr. 8, 2000, http://www.nytimes.com/2000/04/08/opinion/abroad-at-home-serving-family-values.html (stating that "[the] effect of an overbroad law applied rigidly, without humanity, is to punish people . . . .").

broad language is that it leads to inconsistent interpretation and enforcement, erring almost exclusively on the side of the state.[194] The Supreme Court recognized that uniformity should be a guiding principle over the practice of utilizing state law instead of federal categorizations of what constitutes an aggravated felony,[195] but even this endorsement has not prompted Congress to rewrite the law and balance the analysis in a fair manner. So one topic of confusion continues to be whether the term 'felony' is determined under federal or state classifications, or both.[196] Unfortunately, the Supreme Court has provided conflicting guidance on this particular question.[197] This is highly problematic because it could result in even more expansive grounds for denial of naturalization and granting of removal. Immigration judges could exploit this procedural uncertainty and cherry pick from whichever criminal code classifies the applicant's behavior most severely. When such ambiguity comes even from the highest of our courts, we should ask ourselves whether this legal framework is accomplishing a desired and favorable result.

The two major criticisms of this part of the immigration process are first, that the aggravated felony analysis unjustly applies criminal penalties in the civil context of immigration law, and second, that immigration judges avoid looking into the applicant's good acts because no framework exists for doing so. While the Supreme Court has suggested that an analysis based on behavior is acceptable,[198] the current practice overemphasizes bad acts and ignores good ones, resulting in an overall decrease of due process in the immigration process.[199]

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194. *See* Liem, *supra* note 170, at 1081 (considering the aggravated felony category of fraud, which is prefaced by the phrase "relating to" and leads to convictions where intent to defraud or knowledge are not proven, despite that a majority of states require these elements).

195. *See id.* at 1084 (asserting that when no federal definition exists, courts look to a definition that would most likely result in uniformity).

196. *See* Abbe Kingston, *Aggravated Felonies—Harsh Consequences*, KMH IMMIGRATION, http://www.kmhimmigration.com/aggravated-felonies.html (last visited Dec. 24, 2012) (illustrating that even a state misdemeanor at times will qualify as an aggravated felony under the federal definition).

197. *Compare* Lopez v. Gonzalez, 549 U.S. 47, 47 (2006) (holding that state felony of aiding and abetting of possession of cocaine was not contemplated as an aggravated felony under the INA when federal classification of the same crime was a misdemeanor), *with* Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 183 (2007) (holding that violation of California statute prohibiting taking vehicle without consent was a "theft offense" as contemplated by INA § 101(a)(43)(G)).

198. *See Macintosh,* 283 U.S. at 616 (explaining that behavior is a significant factor in establishing or negating whether or not the applicant is of good moral character).

199. *See* Kathleen Lord-Black, *Aggravated Felonies and Due Process*, LEGAL-IMMIGRATION-STATUS.COM (Feb. 25, 2010), http://legalimmigrationstatus.blogspot.com/2010/02/

V. GOOD MORAL CHARACTER

While the term "aggravated felony" has expanded beyond reason,[200] the major critique of the good moral character analysis is that it is under-articulated and ambiguous.[201] The term itself, "good moral character," is necessarily loaded with preconceptions of all types, some concerning the applicant's upbringing and basic morals and others concerning race, socioeconomic status, and the like.[202] It is also loaded with the idea that those who have good moral character do not engage in criminal acts.[203] Consequently, the 'analysis' has devolved into a practice of defining good moral character by what it *is not*.[204] The reporters are packed with examples of courts stating that certain crimes prevent a finding a good moral character, but the record is mostly devoid of cases specifying the positive acts that could prove its existence.[205] The alternative offered in this essay is a simple and familiar balancing test. This test is taken from the recog-

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aggravated-felonies-and-due-process.html (explaining that the definition of aggravated felony has an impact on immigration cases).

> The history of the term 'aggravated felony' as used in U.S. immigration law is a study of the decline of due process in our immigration laws. . . The price of this abridgment to due process is paid for by the lawful permanent residents, their U.S. citizen children, and their spouses and parents whose families are split apart, whose homes are broken, and whose lives are forever altered.

Id.

200. *See id.* (discussing Congress's expansion of the definition of "aggravated felony").

201. Woerner, *supra* note 143, at 12–13.

202. *See id.* (discussing the various factors affecting each judge's definition of "good moral character" in naturalization cases).

203. *See* 8 C.F.R. § 316.10 (2012) (framing the definition of "good moral character" by the focusing on what criminal convictions constitute a lack of "good moral character").

204. *See id.* defining a lack of "good moral character" according to an individual's criminal offenses).

205. *See* Castiglia v. INS, 108 F.3d 1101, 1102 (9th Cir. 1997) (denying an application for naturalization of an Italian Vietnam War veteran based on the presence of a 2nd degree murder conviction from twenty-three years prior); Petition of Suey Chin, 173 F. Supp. 510, 511 (S.D.N.Y. 1959) (denying a World War II veteran's petition for naturalization because of narcotics use and addiction); Pinet v. U.S. Citizenship & Immigration Servs., 556 F. Supp. 2d 55, 55 (D.N.H. 2008) (denying an alien's application for naturalization because of a conviction for use of a communication facility to facilitate a drug transaction); Rico v. I.N.S., 262 F. Supp. 2d 6, 6 (E.D.N.Y. 2003) (holding that an alien's "driving while intoxicated (DWI) conviction, failure to accept responsibility for his past crimes, failure to establish his claim of rehabilitation, and lack of candor, taken together, precluded a finding of good moral character in accord with current moral conventions, as required for naturalization").

nizable context of former INA Section 212(c), which covers waivers of past conduct in removal proceedings.[206]

In 1996 came the repeal of INA Section 212 (c) by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[207] Formerly, this section allowed those facing removal proceedings to seek waiver of their prior convictions based on hardship.[208] As the law stands now, waiver is a virtual impossibility.[209] Instead of requesting a mere suspension of the proceedings, as under Section 212(c), the only recourse is to seek cancellation of the removal proceedings under Section 240(a) which has a much higher burden of establishing hardship.[210] Section 212(c) was repealed during a period of increased anti-immigrant sentiment and the procedural harshness of Section 240(a) is little understood by the general public.[211] Meanwhile, legal permanent residents, the people punished by

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206. *See* Vergara-Molina v. I.N.S., 956 F.2d 682, 684 (7th Cir. 1992) (applying the INA § 212(c) balancing test by using the factors in *Matter of Marin,* 16 I & N Dec. 581, 1978 WL 36472 (BIA 1978) to consider both the positive and negative acts in the background of the individual facing removal, and finding that this instance warranted a finding for the state); Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992) (mentioning the *Matter of Marin* factors specifically and reversing a BIA decision for failing to actually consider positive factors or favorable evidence in a INA 212(c) removal hearing.); Douglas v. I.N.S., 28 F.3d 241, 243–46 (2d Cir. 1994) (denying a petition for review of BIA decision and holding that BIA immigration judge adequately considered the petitioner's positive factors before ordering his deportation, and citing to the *Matter of Marin* positive factors).

207. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240B, 110 Stat. 3009-546, 3009-597 (1996).

208. Immigration and Nationality Act, Pub. L. No. 414, § 212(c), 66 Stat. 163, 187 (1952).

209. 8 U.S.C. § 1229b(b)(1) (2006).

210. Podgorny, *supra* note 163, at 296–297; *see* Flores Juarez v. Mukasey, 530 F.3d 1020, 1021–22 (9th Cir. 2008) (requiring the petitioner to establish good moral character for a period of ten years and establish "exceptional and extremely unusual hardship" before seeking cancellation of removal under 8 USC 1229b); Barco-Sandoval v. Gonzales, 516 F.3d 35, 36 (2d Cir. 2008) (dismissing an alien's petition for review of BIA decision because the court lacked jurisdiction to review the factual and discretionary findings in the BIA's decision).

211. William C.B. Underwood, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases,* 72 INDIANA L.J. 885, 887 (1997).

> In recognition of the harsh results that deportation might impose on certain long-term resident aliens, the Immigration and Nationality Act ("INA") allowed for the discretionary cancellation of an alien's deportation in cases where it would be an extreme hardship for the alien to leave the United States. Despite the enormous discretion vested in agency decision makers" and the erosion of meaningful review," Congress has drastically curtailed this relief and eliminated a fundamental procedural safeguard by categorically prohibiting judicial review.' Thus, it appears that Congress has completely insulated potentially abusive and unconscionable decisions.

Id.

its provisions, suffer without a voice because of the very nature of their status.[212]

In the naturalization context, courts would apply a balancing test of good and bad acts and to determine if the bad acts could be waived and thereby allow the alien to remain in the United States.[213] Admittedly, there are some differences between these two contexts. First, the good moral character requirement is a requirement to prove eligibility for citizenship, while the balancing test related to former Section 212(c) was only applied in removal proceedings.[214] Second, relief under former Section 212(c) was discretionary, as the alien was required to prove the existence of some exceptional hardship,[215] but the mandatory requirement for good moral character has historically focused on negative behaviors that disprove its existence.[216]

However, the similarities are also striking. Both contexts evaluate a non-citizen's past (and future worth) by looking at past criminal acts.[217] Both types of proceedings also adjudicate the status of the individual permanently.[218] Applying the balancing test of former Section 212(c), or a similar one in the good moral character analysis, would correct the injustice of the current jurisprudence as to war veterans.[219] Most foreign service members are overwhelmingly legal permanent residents, thus they likely to have substantial roots here in the United States, including long-

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212. *Id.*

213. *See* Vergara-Molina v. INS, 956 F.2d 682, 684 (7th Cir. 1992) (illustrating the use of a balancing test of good and bad acts); Douglas v. INS, 28 F.3d 241, 243–44 (2d Cir. 1994) (utilizing a balancing test of good and bad acts to determine whether cancellation of removal proceedings was proper).

214. *See* Woerner, *supra* note 143, at 12–13 (outlining judicial tests of what constitutes "good moral character"). *See, e.g.*, Vergara-Molina, 956 F.2d at 684 (utilizing a balancing test in a removal proceeding).

215. *See, e.g.*, Vergara-Molina, 956 F.2d at 684 (illustrating the use of a balancing test in determining whether an alien has endured exceptional hardship).

216. *See, e.g.*, Petition of Suey Chin, 173 F. Supp. 510, 510 (S.D.N.Y. 1959) (determining whether "good moral character" exists by focusing on acts that would not constitute "good moral character").

217. *See, e.g.*, Rico v. INS, 262 F. Supp. 2d 6, 6 (E.D.N.Y. 2003) (finding an alien's past criminal acts an indication of whether he has good moral character); *Matter of Marin*, 16 I&N Dec. 581, 588, 1978 WL 36472 (BIA 1978) (discussing the impact of past criminal acts on an application for § 212(c) relief).

218. *See, e.g.*, *Rico*, 262 F. Supp. 2d at 6 (denying a legal permanent resident's application for naturalization based on past criminal acts); *Matter of Marin*, WL 36472 (denying an appeal of removal proceedings because the past criminal activity of the applicant outweighed any positive effects of granting the appeal).

219. *See* Pinet v. U.S. Citizenship & Immigration Servs., 556 F. Supp. 2d 55, 56 (D.N.H. 2008) (denying a member of the armed force's application for citizenship under the "good moral character" analysis); *Matter of Marin*, 16 I&N Dec. at 588 (outlining the balancing test used in § 212(c) claims).

term employment, business and family connections, and property holdings.[220] These residents are also likely to have been in the United States since childhood, making it completely impractical to remove them to a country where they have no roots and which they have never known as an adult.[221] While it was possible during the Second World War for a foreign national "off the boat," as it were, to join our military, it has long since been a requirement that the potential enlistee be at least a legal permanent resident and the overwhelming majority of foreign service members hold that status.[222] The balancing test would correct the injustice by incorporating the concrete behaviors of holding steady employment and serving in the military in addition to the applicant's bad acts.

VI. MATTER OF MARIN'S POSITIVE FACTORS

One case relating to this provision is *Matter of Marin* in 1978.[223] This Board of Immigration Appeals opinion is significant because it established some positive characteristics that were appropriate to examine alongside the bad acts of the individual facing removal.[224] While the Board did not adopt these factors as a formal test,[225] their influence has been undeniable in immigration decisions, as the "*Marin* factors" have been cited to in one form or another in almost 300 case decisions and over 2,000 briefs and other documents.[226] This group includes every fed-

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220. Andrew Becker & Anna Gorman, *Many Immigrants Deported for Nonviolent Crimes,* LOS ANGELES TIMES, Apr. 15, 2009, http://articles.latimes.com/2009/apr/15/nation/na-deportees15.

221. *Id.*

> [N]early three-quarters of the roughly 897,000 immigrants deported from 1997 to 2007 after serving criminal sentences were convicted of nonviolent offenses, and one-fifth were legal permanent residents . . . The law is retroactive, so immigrants are often deported because of crimes they committed before the law was written . . . The Human Rights Watch report estimates the deportations have caused the separation of more than 1 million family members.

Id. See also Julia Preston, *Young and Alone, Facing Court and Deportation*, N.Y. TIMES, Aug. 25, 2012, http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted=all ("The rush of young illegal border crossers began last fall but picked up speed this year, according to official figures. From October through July, the authorities detained 21,842 unaccompanied minors, most at the Southwest border, a 48 percent increase over a year earlier.").

222. Immigration and Nationality Act, Pub. L. No. 414, § 318, 66 Stat. 244, (1952).

223. 16 I&N Dec. 581, 581 1978 WL 36472 (BIA 1978).

224. *Id.*

225. *Id.*

226. *See* INS v. St. Cyr., 533 U.S. 289, 296 (2001); Casalena v. INS, 984 F.2d 105, 106–07 (4th Cir. 1993); De Freitas Noia v. INS, 974 F.2d 1329 (1st Cir. 1992); Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992); Douglas v. INS, 28 F.3d 241, 243 (2d Cir. 1994); Hajiani-Niroumand v. INS, 26 F.3d 832, 835 (8th Cir. 1994); Hazime v. INS, 17

eral circuit court and the High Court itself.[227] The case involved a Colombian man who was a lawful permanent resident.[228] He served thirty months for criminal sale of cocaine, and after being found deportable he applied for relief under the former provision 212 (c).[229] The court stated that it had "not adopted an inflexible test for an immigration judge to use to determine as a conclusory matter whether Section 212(c) relief should be granted as a matter of discretion."[230] Instead, the Board outlined several adverse factors as well as favorable factors that should be included in the total balancing process. The negative factors listed include a criminal past, violation of immigration laws, and "other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country."[231] The Board then outlined the positive factors:

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends and responsible community representatives).[232]

The Board also required the Immigration Judge to specifically state the basis for his holding in the opinion.[233] The Board later clarified that this

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F.3d 136, 138 (6th Cir. 1994); Nunez-Pena v. INS, 956 F.2d 223, 225 (10th Cir. 1992); Ponce-Alatorre v. INS, 985 F.2d 573 (9th Cir. 1993); Procel-Rivera v. U.S. Atty. Gen., 340 F. App'x 523, 524 (11th Cir. 2009); Tipu v. INS, 20 F.3d 580, 580 (3d Cir. 1994); Vergara-Molina v. INS, 956 F.2d 682, 684 (7th Cir. 1992).

227. INS v. St. Cyr., 533 U.S. 289, 296 (2001); Casalena v. U.S. INS, 984 F.2d 105, 106–07 (4th Cir. 1993); De Freitas Noia v. INS, 974 F.2d 1329 (1st Cir. 1992); Diaz-Resendez v. INS, 960 F.2d 493, 495 (5th Cir. 1992); Douglas v. INS, 28 F.3d 241, 243 (2d Cir. 1994); Hajiani-Niroumand v. INS, 26 F.3d 832, 835 (8th Cir. 1994); Hazime v. INS, 17 F.3d 136, 138 (6th Cir. 1994); Nunez-Pena v. INS, 956 F.2d 223, 225 (10th Cir. 1992); Ponce-Alatorre v. INS, 985 F.2d 573 (9th Cir. 1993); Procel-Rivera v. U.S. Atty. Gen., 340 F. App'x 523, 524 (11th Cir. 2009); Tipu v. INS, 20 F.3d 580, 580 (3d Cir. 1994); Vergara-Molina v. INS, 956 F.2d 682, 684 (7th Cir. 1992).

228. *Matter of Marin*, 16 I&N Dec. 581, 582 (1978).

229. *Id.*

230. *Id.* at 584.

231. *Id.* at 585.

232. *Id.*

233. *See id.* ("Upon review of the record as a whole, the immigration judge is required to balance the positive and adverse matters to determine whether discretion should be favorably exercised. The basis for the immigration judge's decision must be enunciated in his opinion.").

did not mean that the judge's opinion must address each one of the listed factors because it did not adopt them as a rigid test.[234] This creates more flexibility, as opposed to enumerating a list of crimes, which creates automatic exemption, and subsequently, no flexibility.[235] The statutory language itself also contrasts sharply with the actions of immigration judges who use the catchall provision in the statute to circumvent the statutorily defined time periods for proving good moral character and bring in bad acts occurring in the applicant's distant past.[236]

The positive Marin factors can be divided into two groups: conduct or behavior based factors, and circumstantial factors. The first group includes military service, long-term employment, and existence of property of business ties.[237] These factors involve the deliberate and sustained behavior of the applicant.[238] Military service and long-term employment can both be said to negate bad acts because they require that an applicant constantly remain within a restricted range of acceptable behavior. For example, because habitual drunkenness could likely cause someone to lose a job or be discharged from military service, the presence of a period of military service or of a long term job suggests, albeit circumstantially, that the applicant is most likely not a habitual drunkard (also a prohibited status).[239] While the standards for behavior in the military both on and off duty are quite strict compared to most civilian job, even civilian employers will not put up with employees who are constantly in trouble with the law, or who have severe substance abuse problems or who are

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234. *See Matter of Edwards*, 20 I&N Dec. 191 (1990) ("In sum, I believe it is the Board's purpose to provide guidance in the exercise of discretion in these areas but that it is not the Board's intention to provide a formula that should be rigidly followed.").

235. *Matter of Marin*, 16 I&N Dec. 581, 584 (1978).

236. Immigration and Nationality Act 101(f), Pub. L. 414, Ch. 477, 66 Stat. 172 (1952), 8 U.S.C. 1101 (f) (2006); *see* Ikenokwalu-White v. I.N.S., 316 F.3d 798, 804 (8th Cir. 2003) (holding that the decisions under the catchall provision are nondiscretionary and reviewable).

237. *Matter of Marin*, 16 I&N Dec. at 584–85, (1978).

238. *See id.* (listing several factors that have been considered in favor of the applicant).

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *Id.*

239. *See* 8 U.S.C. § 1101(f)(1) (2006) (stating that "[no] person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—(1) a habitual drunkard.").

otherwise involved in crime or vice.[240] Compare the probative value of these types of behavior to the conclusory nature of, for example, an affidavit from an applicant's grandmother explaining in detail the applicant's good moral character.

The presence of property or business ties does not prove good moral character at the same caliber that military service or continued employment do, but it does prove that the applicant has intentionally cultivated a financial stake in this country. Those who invest their own limited financial resources into the American economy by owning property or through business dealings as discussed by the BIA should be afforded some small measure of grace for participating in our economy, if for no other reason than transforming foreign investment into domestic investment. Our history is replete with examples of corporations and the wealthy receiving tax breaks and exemptions for investing their money here[241] and we should likewise extend some small relief towards those foreigners of lesser means who invest their money as well. Such investments are a concrete motivation for an applicant to act with good moral character because holding onto the investment (by remaining in the United States) is conditioned on obeying the law and staying out of trouble. If the applicant has acted badly in the past, then the investment still represents a substantial motivation for true rehabilitation, because the applicant always has an incentive to hang on to his or her money. While this factor does not relate to foreign-born service members per se, it does illustrate another example of a behavior-based factor as favored by the Supreme Court.[242]

This is in stark contrast to today's jurisprudence, where those who aren't deported are left permanently in the purgatory between removal and citizenship. While there are important benefits to being a legal per-

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240. *See, e.g,* Jeremy Korzeniewski, *Chrysler Workers Fired for Drinking Back on Job Against Automaker's Wishes*, AUTOBLOG (Dec. 10, 2012, 8:58 AM), http://www.autoblog.com/2012/12/10/chrysler-workers-fired-for-drinking-back-on-job-against-automake/ (describing that the number of employees who drink on the job is not decreasing: "According to Fox 2 News in Detroit, the [thirteen] workers who were fired in 2010 after its cameras caught them drinking alcohol and smoking what [seems] to be marijuana in a park during work hours have been reinstated following arbitration.").

241. Kay Bell, *5 Unfair Tax Breaks That Should be Eliminated*, YAHOO (Dec. 19, 2012, 2:47 PM), http://finance.yahoo.com/news/5-egregious-tax-loopholes-benefit-080033155.html.

> Businesses also get their fair share of tax breaks and tax loopholes. The ability to save on corporate taxes by shipping operations overseas is one of the most vilified corporate tax breaks. U.S. businesses get a tax deduction for the costs they incur in relocating their domestic operations to a foreign location.

Id.

242. *Macintosh*, 283 U.S. at 605.

manent resident, these increasingly large numbers of second-rate members of society are permanently barred from having any say in the political process, from holding many types of jobs, and from receiving many types of government benefits. The worst part is that legal permanent residents are always subject to deportation if they get into trouble.[243] A naturalized citizen cannot be deported and only under extreme circumstances can they be denaturalized and potentially removed to their nation of origin.[244] A common theme among these shortcomings is that legal permanent residents are many times left with no path towards citizenship and true membership in the community.[245] While this injustice is difficult for the entire population of applicants for citizenship, it is particularly burdensome on combat veterans because they quite literally may hold in one hand a Department of Defense Form 214 (Certificate of Release or Discharge from Active Duty) characterizing their service as honorable,[246] and in the other hand an opinion from an immigration judge stating that a finding of good moral character is improper.

VII. THE NEED FOR A FRAMEWORK TO ANALYZE THE GOOD ACTS OF APPLICANTS

The other category of the positive *Matter of Marin* factors is decidedly less probative of good moral character because they consist merely of bare associations with the United States or of conclusory statements of good moral character. This kind of evidence does not contain much probative value because it either proves nothing other than an applicant's physical presence or that of their family, or comes from a biased or self-interested source. For example, the simple fact of family ties within the United States does not prove that an applicant has a particularly moral or well-behaved family but rather it only proves the geographical location of the applicant's family. While keeping families together is a noble and

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243. Agence France-Presse, *Supreme Court Considers Rights of U.S. Permanent Residents*, THE RAW STORY (Jan. 18, 2012, 7:54 PM), http://www.rawstory.com/rs/2012/01/18/top-court-considers-rights-of-u-s-permanent-residents/.

> The US government has been deporting record numbers of non-citizens—nearly 400,000 a year since 2009, according to the Department of Homeland Security—and legal challenges to these removals have been on the rise . . . . Under US law, legal permanent residents that hold 'green cards' can live and work in the United States with few restraints, but can be deported under certain circumstances.

Id.

244. *See* United States v. Kairys, 782 F.2d 1374, 1376–77 (7th Cir. 1986) (holding proceedings for revocation of naturalization for lying about working in a Nazi labor camp valid).

245. *Id.*

246. *Discharge Papers and Separation Documents*, ARCHIVES, http://www.archives.gov/st-louis/military-personnel/dd-214.html.

worthy goal, it does not establish the character of those seeking citizenship. Likewise, residence of long duration in this country only suggests just what it states, but rather only that the applicant was physically present. Additionally, providing the court with affidavits from family members or friends does not serve as objective evidence of good behavior. While many applicants might find such affidavits convincing, they are almost invariably obtained from those who have a clear bias toward the applicant's admission, perhaps even a pecuniary interest in it, and in most other settings such affidavits would constitute inadmissible character evidence.[247] An obvious exemption to this general rule should pertain to those who come here by various means as children through no fault of their own and know no other country as a home.[248] It is certainly unjust to send those persons back to a country that they may have known only in their youth. While much litigation and controversy surrounds proving up evidence of hardship to the respondent and family if deportation occurs,[249] the hardship analysis always requires the court to engage in a fact specific analysis of each case. Thus, as a group, this particular category is not a good barometer of good moral character because each case is vastly different. How can one person's emergency or hardship be weighed against another? How can any one of these situations demonstrate a person's good moral character as opposed to another? Likewise, the demon-

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247. FEDERAL EVIDENCE REVIEW, FEDERAL RULES OF EVIDENCE 2012, 18–19, 26, (2006).

248. Adriane Meneses, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation As Punishment*, 14 SCHOLAR 767, 820 (2012).

> Although reportedly less common than the deportation of alien veterans and alien service members, foreign-born children adopted from abroad face deportation in cases where their naturalization was never completed by their adoptive parents. . .When these adopted lawful permanent residents are convicted of deportable offenses, a lack of available discretion on the part of trial judges or immigration judges renders their removal mandatory—often to countries they cannot remember and where they have no known family.

Id.; *see also* Satya Grace Kaskade, *Mothers Without Borders: Undocumented Immigrant Mothers Facing Deportation and the Best Interests of Their U.S. Citizen Children*, 15 WM. & MARY J. WOMEN & L. 447, 451 (2009) (discussing how deportation of immigrant parents affects citizen-children born in the United States).

249. Jennifer Lindsley, *All Relevant Factors: Gender in the Analysis of Exceptional and Extremely Unusual Hardship*, 19 WIS. WOMEN'S L.J. 337, 339 (2004); *see also* Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. DAVIS L. REV. 193, 207–08 (2009); *see also* Patricia Dysart Rudloff, *In Re Oluloro: Risk of Female Genital Mutilation As "Extreme Hardship" in Immigration Proceedings*, 26 ST. MARY'S L.J. 877, 886–87 (1995); Susan L. Kamlet, *Judicial Review of "Extreme Hardship' in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175, 176 (1984); *V. the Procedural Rights of Deportable Aliens*, 96 HARV. L. REV. 1370, 1386 (1983); Underwood, *supra* note 211, at 900.

stration of value and service to the community, proof of a genuine rehabilitation for criminals, and other evidence like affidavits from friends, family, and community members all suffer from the same flaw of requiring copious amounts of context to demonstrate anything good or bad. This is a disadvantage because it requires a much greater amount of work on behalf of the court and does not generate a set of elements or guidelines for the court to use in that work because each instance is completely unique. While such humanitarian situations should not be overlooked, they simply make a bad framework for beginning the discussion of how to analyze good acts in the good moral character analysis.

When compared to the second category of Marin factors, the first is more useful as a measuring stick because it consists of documented long-standing patterns of behavior that tend to disprove other types of bad behavior. This creates a solution to bridge the gap and serve both interests. This is important because the government does have an interest in encouraging naturalization, which allows them to justify discriminating against non-citizens.[250] This is the same interest that prompted the good moral character requirement to be adopted over two hundred years ago.[251] It goes without saying that the government does have a substantial interest in ensuring that applicants for citizenship are not criminals and that they have the requisite good moral character to participate in our society. Additionally, the actions in the first category are comparable to one another, meaning that they can be used as a standard as opposed to contextual evidence or other character evidence that can only be judged on a case-by-case basis. For example, the service of a male who served honorably during the Vietnam War is quite comparable to the service of a female who served during combat in Iraq. Even though the their service took place in vastly different places and years apart, one can still draw the same conclusions about their behavior as long as their time in the military was characterized as honorable upon separation or retirement. This logic also holds true in the long-term employment context because such employment establishes a pattern of good behavior. Long-term employment proves stability and an ability to work in an environment with other individuals.[252] A construction worker and a doctor lead strikingly different lives while pursuing their trade each day and have highly different qualifications, but they also both meet some very important basic requirements of almost all jobs—and both can be fired if they do not continually meet them. These requirements include things like showing up on time every day, meeting basic deadlines, meeting basic

250. Lapp, *supra* note 36, at 1583.

251. *Id.*

252. *Matter of Marin*, 16 I&N Dec. 581, 584–85, (1978).

goals for performance, and reliability in showing up every day. They reflect that both white-collar and blue-collar workers meet some of the same behavior standards.

While it appears logical to include such good acts in an analysis for good moral character, the vast majority of cases never consider the applicant's good acts in a meaningful way.[253] Those that even mention good factors usually summarily reject those factors as unable to rehabilitate an applicant from the statutorily prohibited conduct.[254] In essence, these behavior-based categories should be given more weight in the analysis of positive factors in the good moral character context because they can convincingly outweigh the presence of isolated non-violent bad acts. The government has two substantial interests in this context: the interest in ensuring the quality of applicants for citizenship, and the interest in maintaining the due process guarantees of the Constitution while doing so.

VIII. CONCLUSION

Immigration reform is among the most contentious domestic issues of any recent election. While many would agree that the current system of good moral character analysis and the engorged list of aggravated felonies are far too draconian, few can agree on any alternative. This Comment suggests that the old balancing test from former Section 212(c) be applied to the context of naturalization for war veterans, not only for their benefit, but to articulate a framework for analyzing positive behaviors of the applicant. This is because foreign-born service members are a

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253. *See* Castiglia v. INS, 108 F.3d 1101, 1102 (9th Cir. 1997); Petition of Suey Chin, 173 F. Supp. 510, 511 (S.D.N.Y. 1959); Pinet v. U.S. Citizenship & Immigration Servs., 556 F. Supp. 2d 55, 55 (D.N.H. 2008); Rico v. INS, 262 F. Supp. 2d 6, 6 (E.D.N.Y. 2003) (holding that an alien's "driving while intoxicated (DWI) conviction, failure to accept responsibility for his past crimes, failure to establish his claim of rehabilitation, and lack of candor, taken together, precluded a finding of good moral character in accord with current moral conventions, as required for naturalization"); Toolasprashad v. Schult, No. 10-CV-1050 (LEK/DRH), 2011 U.S. Dist. WL 3157297, at *7 (N.D.N.Y. Apr. 7, 2011) *report and recommendation adopted*, No. 10-CV-1050 (LEK/DRH), 2011 WL 3157290 (N.D.N.Y. July 26, 2011) (denying a writ of habeas corpus and denying a petition for naturalization of an Army veteran from Guyana because of his guilty plea to aiding and abetting of a murder).

254. *See generally Matter of Marin*, 16 I&N Dec. 581 (1978) (stating that favorable factors will not result in rehabilitation of the applicant).

> We find no merit to the challenge to the other considerations cited by the immigration judge in reaching his decision on the exercise of discretion (e.g., the presence of a brother and sister in Colombia; the absence of a showing of unusual "hardships" if deported) for the same reasons noted above. Each factor cited was relevant to the issue of whether discretion should be favorably exercised, and each was considered by the immigration judge in the context of finding that the respondent had failed to come forward with sufficient equities to offset the significant unfavorable evidence.

Id. at 587.

discrete group, and because their major positive factor (military service during wartime) enables courts to analyze them as unified group instead of subjectively comparing one individual's personal hardship to another. Additionally, one of the fastest growing minority populations in the United States is the Hispanic community[255] and, as stated earlier, the two largest groups of foreign service-members come from Mexico and the Philippines. Therefore, applying the balancing test to war veterans would also benefit the largest minority group in the wider pool of applicants as well. By applying this balancing test to combat veterans, the public would gain the benefits of a logical and balanced approach to evaluating applicants for citizenship, and veterans would benefit by receiving the proper respect for their heroic sacrifice. Two other important goals can be accomplished simultaneously by making this change. The first is that the government's substantial interest in vetting applicants for citizenship would remain unhindered. The second interest preserved is that of foreign-born service members in having an accessible path to citizenship through military service to our country.

While this article is not meant to critique the standards for joining the military, it is an analysis on the disparity between the standards to enlist (and wind up being sent to a presidentially designated hostile-fire zone), and the standards to become a citizen when those standards include attachment to the principles of the Constitution and good moral character. One who pledges to, and actually does, defend out nation under the requirements of the enlistment standards establishes *prima facie* their compliance with the naturalization standards.

This piece is also a critique on the labeling of non-violent, unarmed crimes as "aggravated." Closely related is the flaw of inserting too many criminal standards into the civil jurisprudence relating to naturalization and the analysis of good moral character. Instead of relying solely on negative actions to define this important concept, the analysis should incorporate behavior-based measures of good acts and weigh those against the applicant's past crimes. Applicants will still be barred for their past acts of violence, but their service will be able to rehabilitate the presence

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255. *See* Stephanie Siek, *Census: Hispanics are 'the most populous' and 'fastest growing minority group'*, NEWS CHANNEL 5 WPTV (May 17, 2012), http://www.wptv.com/dpp/news/national/census-hispanics-are-the-most-populous-and-fastest-growing-minority-group (stating that Hispanics is the minority group with greatest growth).

> The figures[—]which defines 'minority' as anyone who does not identify themselves as white (as a single race) and non-Hispanic[—]count Hispanics as 'the most populous' and 'fasting growing minority group.' They numbered [fifty-two] million in 2011, and their population grew by 3.1 [percent] since 2010. The U.S. Hispanic population grew from 16.3 [percent] in 2010 to 16.7 [percent] in 2011.

Id.

of other crimes and we will be able to bring these brave and honorable men and women fully into our American community. The sacrifice they make on behalf of our nation is clearly worthy of bestowing such an honor on them, and our long history of caring for our veterans demands that we take such action.

Finally, when contemplating who these service members really are and what they really add to our nation, remember the story of Lt. Col (Ret.) Alfred Rascon of the U.S. Army. His extraordinary story started when he was born in Chihuahua, Mexico in 1945.[256] His family immigrated to California when he was a boy and he joined the U.S. Army out of high school.[257] During his first tour in Vietnam, when his platoon was pinned down by the enemy, then Specialist Rascon, a medic, crawled forward of the front lines to rescue several wounded comrades under heavy fire.[258] Rascon repeatedly exposed himself to blistering enemy fire and actually shielded his fellow soldiers from grenades with his own body and saving two of their lives in the process.[259] He was so badly wounded that he was given his last rites, but miraculously he survived.[260] He went on to serve another tour in Vietnam and in 1967 he became a naturalized U.S. citizen.[261]

Rascon's recommendation for the Medal of Honor got lost, however in 1993 several of the men who were saved by Rascon asked that his file be reopened.[262] After realizing that he had not been properly recognized, they banded together and were able to get his citation packet before President Bill Clinton.[263] The President was able to work with the Pentagon to complete Rascon's packet and in February of 2000, he actually received the Medal of Honor, our nation's highest award for bravery in combat.[264] After this he went on to head up the nation's Selective Service System.[265] He even went further and rejoined the Army to serve

256. *Alfred Rascon*, MEDAL OF HONOR SPEAKOUT, http://www.medalofhonor-speakout.org/bio/alfred-rascon (last visited Dec. 24, 2012).

257. *Id.*

258. Chris Carter, *Alfred V. Rascon Medal of Honor citation*, VICTORY INSTITUTE, http://www.victoryinstitute.net/blogs/utb/2000/03/16/alfred-v-rascon-medal-of-honor-citation/ (last visited Dec. 24, 2012).

259. *Id.*

260. *Alfred Rascon*, MEDAL OF HONOR SPEAKOUT, *supra* note 256.

261. Muphen R. Whitney, *Medal of Honor Recipient Speaks at Fort Detrick*, DCMILITARY.COM, (Apr. 10, 2008), http://ww2.dcmilitary.com/stories/041008/standard_28234.shtml.

262. *Alfred Rascon*, MEDAL OF HONOR SPEAKOUT, *supra* note 256.

263. *Id.*

264. Muphen R. Whitney, *supra* note 261.

265. *Id.*

tours in Iraq and Afghanistan in the medical corps.[266] While addressing the Senate in 1999 Rascon said that:

> [T]he Army provided me with an opportunity to serve my adopted country. Above all it gave me the opportunity to give something of myself to this great nation. I was once asked by a reporter why, as a non-citizen of the United States, I volunteered to join the military and serve in Vietnam. I answered, 'I was always an American in my heart.'[267]

266. *Id.*
267. *Id.*